Bridon Cordage, Inc. *and* United Steelworkers of America, AFL–CIO, CLC. Cases 18–CA–13178, 18–CA–13344, and 18–CA–13632

September 29, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On February 29, 1996, Administrative Law Judge William J. Pannier issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a brief in support of cross-exceptions and in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The Respondent manufactures primarily agricultural baler twine at a facility in Albert Lea, Minnesota. The Respondent is a wholly owned subsidiary of Bridon America, which is a wholly owned subsidiary of Bridon plc Group. For "non-core businesses" such as the Respondent, Bridon plc Group requires an annual return on average capital of 20 percent.[3] Although profitable, the Respondent had never achieved the 20 percent return target.[4]

The judge found that, in 1992, Bridon America's president reviewed the Respondent's situation and concluded that inventory was too high because more was being manufactured than was being sold and that operating expenses were excessive. Crediting the testimony of the Respondent's president, William Adams, the judge found that, as early as November 1993 and prior to the Union's organizational campaign, the Respondent had decided to eliminate its excess inventory by reducing production, to reduce wages which exceeded comparable area and industry rates, and to increase production at its Jerome, Idaho plant from 25 to 50 percent. In March, the Respondent's concern over its excess inventory was magnified by the loss of its Canadian market, which accounted for approximately 22 percent of its sales.

At a meeting with the employee committee[5] on March 23, 1994,[6] Adams announced the Respondent's first layoff ever of production employees. Layoff notices were issued on March 24 for April 11, April 11 for April 25, on April 18 for May 2. At a meeting with employees in late April, Adams was asked if the May 2 layoff would be the last. Adams replied, "We don't know. We don't anticipate bringing hourly down to [zero] for any period of time. I can't say we wouldn't go down to Techs for some time. There will be some effect on how fast we work off our inventory and how fast Jerome will be up."

A representation election was held on April 29, and on May 6, the Union was certified as the exclusive collective-bargaining representative of the Respondent's Albert Lea production and maintenance employees. By notice to employees dated May 9, 1994, the Respondent announced a fourth layoff, "effective 6:00 a.m., on Monday May 23, 1994." The judge found, and it is undisputed, that the layoffs occurred on that date and that the Respondent gave no notice to the Union, other than the May 9 announcement to employees.[7]

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify the Union of the May 23 group layoff, and by failing to bargain over the layoff decision and the effects of the decision. The judge dismissed this allegation. The General Counsel excepts, arguing that the Respondent was obligated to notify and bargain with the Union over the layoff and its effects.[8]

The Respondent was not required to bargain with the Union over its decision to reduce inventory because that decision was made prior to the Union's victory in the Board election. See *Howard Plating Industries*, 230 NLRB 178, 179 (1977) (an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representa-

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to recall work restricted employees from layoff in seniority order between June and October 1994, we note that the Respondent may offer evidence in compliance that these employees could not have worked before their actual recall date because their medical restrictions could not be reasonably accommodated.

[2] We have further modified the judge's recommended Order to conform to the Board's decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

[3] The judge found that, in 1992, it was decided that Bridon America operations must meet the target rate of return or the assets must be sold.

[4] In 1992, the Respondent's rate of return was 8 percent.

[5] From 1976 to 1994, an employee committee negotiated agreements with the Respondent for terms and conditions of employment on behalf of the production and maintenance employees. The Respondent's conduct with respect to the employee committee was not alleged as a violation of Sec. 8(a)(2). By letter dated March 10, the Union notified the Respondent that it was organizing the Albert Lea production and maintenance employees.

[6] Unless otherwise indicated, all dates are in 1994.

[7] There is no evidence that the Union received actual notice of the May 9 announcement.

[8] The record identifies two such effects of the May 23 layoff: the assignment to supervisors of work the laid-off employees otherwise would have performed and the recall of unit employees from layoff. The record shows that before taking these actions, the Respondent failed to notify the Union and provide it with an opportunity to bargain.

tion).[9] The Respondent, however, was required to bargain with the Union over the *effects* of the decision to reduce inventory. See *Fast Food Merchandisers*, 291 NLRB 897, 900 (1988); *Litton Business Systems*, 286 NLRB 817, 820 (1987), enfd. in pertinent part 893 F.2d 1128 (9th Cir. 1990), reversed in part on other grounds 501 U.S. 190 (1991). As the facts set forth above reveal, the decision to reduce inventory resulted in a series of four layoffs. The first three layoffs were announced before the Board election, but the fourth layoff was not announced until May 9, 3 days after the Union's certification. Therefore, the fourth layoff was a mandatory subject of bargaining as an *effect* of the decision to reduce inventory. As the Board explained in *Fast Food* and *Litton*, even where layoffs are the direct result of a decision that is not itself a mandatory subject of bargaining, there is still room for bargaining about the layoffs themselves. There are alternatives that an employer and a union can explore to avoid or reduce the scope of the layoffs without calling into question the employer's underlying decision. Id. For these reasons, we find that the Respondent was obligated to notify and bargain with the Union over the fourth layoff decision and its effects.

There is no claim that the Respondent notified the Union of the pending layoff. The only notice that was given was to employees. Notification to unit employees, however, is not equivalent to providing notice to their collective-bargaining representative. There is a legal distinction between employees and their selected representative. As the Supreme Court stated in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967), "*only the union* may contract the employees' terms and conditions of employment." (Emphasis added.) See *NLRB v. Walker Construction Co.*, 928 F.2d 695 (5th Cir. 1991) (the employer is required to notify the union itself, not just bargaining unit employees, of a new wage and health and benefits program); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961) (notice of changes to employees is not an adequate substitute for notice to the union); *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013, 1016 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) (most important factor in finding that the employer's announced change was a fait accompli was that it was made without special notice in advance to the union and the union's officers became aware of the change merely because they themselves were employees); *Fire Tech Systems*, 319 NLRB 302, 305 (1995). Accordingly, we find that the Respondent's May 9 notice to employees did not constitute notice to the Union of the May 23 layoff.

Having found that the Union did not receive notice of the May 23 layoff, we further find that the Respondent cannot then rely on the Union's failure to request bargaining as a ground for dismissing the 8(a)(5) allegation. *United Hospital Medical Center*, 317 NLRB 1279, 1283 (1995); *Walker Construction Co.*, 297 NLRB 746 fn. 1 (1990). We therefore conclude that by failing to notify the Union of the May 23 layoff and afford the Union an opportunity to bargain over the layoff and its effects as a direct result of its nonbargainable decision to reduce inventory, the Respondent violated Section 8(a)(5) and (1) of the Act.[10]

AMENDED REMEDY

Having found that the Respondent engaged in the unfair labor practices set forth above, we shall amend the remedy set forth in the judge's decision to order the Respondent to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, we shall order bargaining concerning the May 23, 1994 layoff and its effects, and will provide a limited backpay remedy analogous to that set forth in *Transmarine Navigation Corp*., 170 NLRB 389 (1968).[11]

Thus, the Respondent shall pay employees backpay at the rate of their normal wages when last in the Respondent's employ, from 5 days after the Board's decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union about the May 23, 1994 layoff and its effects; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 business days of our decision, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union;[12] or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount that he or she would have earned as wages from the date on which he or she was laid off to the time he was recalled or secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the

[9] Therefore, we find it unnecessary to pass on the judge's finding that the decision to reduce inventory was "an entrepreneurial one, unrelated to subjects entrusted to the bargaining process under Sec. 8(d) of the Act."

[10] We find that this additional violation, considered collectively with the unilateral changes found by the judge, does not detract from the judge's findings that the record does not establish that the Respondent bargained in bad faith or that its failure to observe all aspects of its statutory bargaining obligation tainted the impasse the parties reached during their negotiations in 1995.

[11] Where, as here, the evidence establishes that a layoff was the direct result of a decision over which an employer has no bargaining obligation, the Board has provided the more limited *Transmarine* "effects" remedy. *Fast Food Merchandisers*, 291 NLRB at 899–902; *Litton Business Systems*, 286 NLRB at 819–821. This limited remedy is distinguishable from those cases where the layoff decision was a separate and independent employer decision and not the direct result of an earlier, nonbargainable decision. In such cases, a full backpay and reinstatement remedy for the layoffs is ordered. See, e.g., *Adair Standish Corp.*, 292 NLRB 890 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990).

[12] *Melody Toyota*, 325 NLRB 846 (1998).

Respondent's employ. Interest shall be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Bridon Cordage, Inc., Albert Lea, Minnesota, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Delaying in providing completed monthly evaluations or other relevant information to United Steelworkers of America, AFL–CIO, CLC, for employees in the following appropriate bargaining unit for which it is the exclusive representative under Section 9(a) of the National Labor Relations Act:

> All hourly, full-time and regular part-time production and maintenance employees employed at Bridon Cordage, Inc.'s Albert Lea, Minnesota facility; excluding office clerical employees, confidential employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(b) Changing shifts or days and hours of work, failing to recall employees from layoff according to existing practice, implementing evaluation systems and revising those systems, changing the practice for selecting applicants for posted vacancies, changing the practice of polling employees as to desired startup time following holiday shutdowns, changing the group insurance plan carrier, and changing other terms and conditions of employment of bargaining unit employees without prior notice to the above-named labor organization, and without affording it an opportunity to bargain meaningfully.

(c) Laying off employees without prior notice to the above-named labor organization, and without affording it an opportunity to bargain meaningfully over the layoff and its effects as a direct result of its decision to reduce inventory.

(d) Threatening employees with relocation of unit work if the above-named labor organization does not begin meeting to conduct negotiations.

(e) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by the Act.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act.

(a) On request by the above-named labor organization, rescind the mid-1995 revision of the monthly evaluation forms and, further, if requested to do so by that labor organization, remove from the personnel files of all bargaining unit employees all copies of completed revised forms and refrain from relying upon those completed revised forms in any future personnel actions.

(b) On request by the above-named labor organization, make a meaningful effort to restore coverage under its group insurance plan by Phoenix American Life Insurance Company for all bargaining unit.

(c) On request by the above-named labor organization, bargain over the May 23, 1994 layoff and its effects as a direct result of its decision to reduce inventory.

(d) Make whole all employees who suffered losses as a result of the changes in work schedules on May 23, 1994, and of disregarding the practice of polling employees about startup times after holiday shutdowns on and after Memorial Day 1995, all work-restricted employees who were skipped in the course of recalling employees from layoff between June and October 1994, and the more senior of Charles Joel or Gregory McKane, and any other employees who applied but were passed over for posted vacancies, because of the unilaterally implemented policy of restricting the number of work-restricted employees who could be on a shift, with interest as provided in *New Horizons for the Retarded*, supra.

(e) Pay the employees who were laid off on May 23, 1994, backpay as set forth in the amended remedy section of this decision.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Albert Lea, Minnesota, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 9, 1994.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT delay in providing completed monthly evaluations or other relevant information to United Steelworkers of America, AFL–CIO, CLC, for employees, which it represents as the exclusive bargaining representative of:

> All hourly, full-time and regular part-time production and maintenance employees employed at Bridon Cordage, Inc.'s Albert Lea, Minnesota facility; excluding office clerical employees, confidential employees, professional employees, managerial employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT, without prior notice to the above-named labor organization and affording it an opportunity to bargain meaningfully, change shifts nor days and hours of work, fail to recall employees from layoff according to existing practice, implement evaluation systems and revise those systems, change practice for selecting applicants who apply for posted vacancies, change the practice of polling employees as to desired start-up time following holiday shutdowns, change the group insurance plan carrier, nor make other changes in terms and conditions of employment of employees in the above-described unit.

WE WILL NOT lay off employees without prior notice to the above-named labor organization, and without affording it an opportunity to bargain meaningfully over the layoff and its effects as a direct result of our decision to reduce inventory.

WE WILL NOT threaten you with relocation of your work if the above-named labor organization does not begin meeting to conduct negotiations for employees in the above-described bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by the National Labor Relations Act.

WE WILL, on request by the above-named labor organization, rescind the mid-1995 revision of the monthly evaluation forms and, if requested to do so by that labor organization, expunge from personnel files of all employees in the above-described bargaining unit all copies of completed revised forms and refrain from relying upon those completed revised forms in any future personnel action involving employees in that appropriate bargaining unit.

WE WILL, on request by the above-named labor organization, make a meaningful effort to restore coverage under our group insurance plan by Phoenix American Life Insurance Company for all employees in the above-described appropriate bargaining unit.

WE WILL, on request by the above-named labor organization, bargain over the May 23, 1994 layoff and its effects as a direct result of our decision to reduce inventory.

WE WILL make whole all employees who suffered losses as a result of our unilateral action of changing the work schedule on May 23, 1994, and of disregarding the practice of polling employees about startup times after holiday shutdowns on and after Memorial Day 1995, all work-restricted employees who were skipped in the course of recalling employees from layoff between June and October 1994, and the more senior of Charles Joel or Gregory McKane, and any other employees who applied but were passed over for posted vacancies, because we unilaterally implemented a policy of restricting the number of work-restricted employees who could be assigned to any shift.

WE WILL pay the employees who were laid off on May 23, 1994, backpay as set forth in the amended remedy section of this decision.

BRIDON CORDAGE, INC.

Marlin O. Osthus, Esq., for the General Counsel.
*Lisa Hurwitz Dercks, Dominic J. Cecere, and Maura S. Murphy, Esqs. (Doherty, Rumble & Butler) (*by *John J. McGirl,* with them on brief), for the Respondent.
Michael J. Kodluboy1, of Oakdale, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. On November 18, 1994, the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated and amended complaint, and notice of hearing in Case 18–CA–12178, based on an unfair labor practice charge filed on July 5, 1994, and in Case 18–CA–13344, based on an unfair labor practice charge filed on October 21, 1994, and an amended charge filed on November 17, 1994. On January 20, 1995, the Regional Director issued an amendment to order consolidating cases, consolidated and amended complaint and notice of hearing. Those consolidated and amended complaints, and the amendment to them, allege violations of Section 8(a)(1), (3) and (5) of the National Labor

Relations Act (the Act). From February 22 to 24, 1995, I heard the first week of that matter in Albert Lea, Minnesota, and from March 28 to 31, 1995, heard the final week of that matter in Minneapolis, Minnesota.

On June 30, 1995, the Regional Director for Region 18 issued a complaint and notice of hearing in Case 18–CA–13632, based upon an unfair labor practice charge filed on June 2, 1995, and an amended charge filed on June 27, 1995. The Regional Director issued an amendment to complaint on July 21, 1995. On August 24, 1995, he issued a second amendment to complaint, based upon a second amended unfair labor practice charge filed on August 24, 1995. The hearing in Case 18–CA–13632 was conducted in Minneapolis on September 5 and 6, 1995. On the second day of that hearing, I granted the motion to, in effect, reopen the concluded hearing in Cases 18–CA–13178 and 18–CA–13344 and consolidate with them the proceeding in Case 18–CA–13632. As a result, the three initially separate unfair labor practice charges are now consolidated for decision.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs which were filed,[1] and upon my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

This exceedingly involved case is primarily a table bargaining one. Still, as will be seen, it is one which also relies on allegedly unlawful conduct away from the bargaining table. As a result, that conduct, as well as the bargaining, must be covered. So, too, must an extensive number of events which preceded establishment of the bargaining relationship that gives rise to the issues posed by the complaints. Without an understanding of those events, the issues cannot properly be understood, much less evaluated under the Act.

Bridon Cordage, Inc. (Respondent), is a corporation, with an office and place of business in Albert Lea, Minnesota, where it manufactures primarily agricultural baler twine.[2] It also operates a facility in Jerome, Idaho, sometimes referred to as Bridon West.

On March 10, 1994, Respondent received notice that United Steelworkers of America, AFL–CIO, CLC (the Union),[3] was attempting to organize production and maintenance employees at Albert Lea. During a representation election, conducted on April 29, 1994, a majority of eligible employees there voted in favor of representation by the Union. As a result, on May 6, 1994, the Union was certified as the exclusive collective-bargaining representative of all employees in an appropriate bargaining unit of:

> All full-time and regular part-time production and maintenance employees employed at [Respondent's] Albert Lea, Minnesota facility; excluding office clerical employees, confidential employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

Even before that election, alleges the General Counsel, Respondent violated Section 8(a)(3) and (1) of the Act by laying off employees on April 11 and 25, 1994, by failing to recall them from layoff, and by assigning their work to supervisors. Furthermore, the General Counsel alleges that on March 23, 1994, Respondent's president, William Adams,[4] threatened that employees would be laid off and, also, that jobs and equipment would be transferred to the Jerome facility, because of employees' union activities, in violation of Section 8(a)(1) of the Act. And, the General Counsel alleges, on April 25, 1994, Respondent's production superintendent, Terry VanKampen,[5] threatened that employees were being laid off out of seniority order because of the Union, in violation of Section 8(a)(1) of the Act.

After the election, alleges the General Counsel, Respondent continued engaging in unfair labor practices which violated Section 8(a)(1) and (3) of the Act. Thus, it is alleged that Respondent violated Section 8(a)(1) of the Act on about May 23, 1994, when Shift Supervisor Wade Carlson[6] threatened that Respondent would move part of its operations from Albert Lea to Jerome if the Union did not start negotiating; on a date between April 29 and June 15, 1994, when Production Manager Peter A. Johnson[7] threatened that employees better accept whatever Respondent offered during negotiations, because the longer negotiations took, the less employees would receive; and, on a date between April 29 and June 15, 1994, when Production Superintendent VanKampen threatened that Respondent was planning to move operations to Jerome if the Union did not speedily agree to a contract.

As to the alleged violations of Section 8(a)(3) of the Act, Respondent continued laying off employees, on May 2 and 23 and on July 17, 27, 28, and 29, 1994. The General Counsel alleges that each layoff had been unlawfully motivated, as had been Respondent's failure to promptly recall each of those employees from layoff. So, also, alleges the General Counsel, was Respondent's motivation unlawful for assigning an increasingly greater amount of production work to supervisors and managers, to perform that which would have been performed by laid-off unit employees, in the wake of those layoffs.

There were additional postelection and postcertification actions which the General Counsel alleges had been unlawfully motivated, in violation of Section 8(a)(3) and (1) of the Act: Combining shifts and changing days and hours of work of unit employees beginning May 23, 1994; transferring production work from Albert Lea to Jerome on July 5, 1994; and contracting out bargaining unit work beginning about September 7, 1994. Inasmuch as such conduct, if unlawfully motivated, would tend to show that Respondent was not disposed to bar-

[1] I deny the motion to strike a portion of the brief filed on behalf of Bridon Cordage, Inc., in Case 18–CA–13632.

[2] Respondent admits that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, based upon the admitted facts that during calendar year 1993 it sold goods valued in excess of $50,000 which were shipped from its Albert Lea facility directly to points outside of the State of Minnesota and, further, it purchased goods valued in excess of $50,000 which it received at Albert Lea directly from points outside of Minnesota.

[3] At all material times, the Union has been a labor organization within the meaning of Sec. 2(5) of the Act.

[4] An admitted statutory supervisor and agent of Respondent at all material times.

[5] An admitted statutory supervisor and agent of Respondent at all material times.

[6] An admitted statutory supervisor and agent of Respondent at all material times.

[7] An admitted statutory supervisor and agent of Respondent at all material times.

gain in good faith and, further inherently taint any bargaining which did occur from June 1994 until June 1995, when Respondent implemented its last, best, and final offer, the General Counsel alleges that it violated Section 8(a)(5) and (1) of the Act, as well. However, as to the allegations pertaining to Respondent's bargaining, the General Counsel advances on several other fronts, as well.

First, it is alleged that, following the representation election, Respondent engaged in an ongoing series of actions affecting unit employees, without prior notice to the Union and, in consequence, without affording it an opportunity to bargain about any one of those actions. Some pointed to by the General Counsel are enumerated above: Layoffs of unit employees and assignment of an increasingly greater amount of unit work to supervisors after April 29, 1994; combining unit employees' shifts and changing their days and hours of work beginning May 23, 1994; transferring unit work to Jerome on July 5, 1994; and contracting out unit work beginning about September 7, 1994.

During June and July 1994 laid-off employees were recalled and some were then laid off again, once they had completed whatever work they were recalled to perform. The Union was never given advance notice of any of the recalls and of the subsequent layoffs which followed.

Certain other actions are alleged to have been taken unilaterally, though not for unlawful motivation. Since June 15, 1994, employees were subjected to periodic "peak alert" plant shutdowns, pursuant to a contract between Respondent and the supplier of its electricity.[8] During July 1994, employees began to receive evaluations of their work under a newly instituted system. Since February 1995, the criteria has been altered for selecting among employees applying for unit positions that are posted as being vacant. Beginning on May 26, 1995, alleges the General Counsel, Respondent altered the method for determining the startup time after holidays. Unit employees' group insurance plan carrier was changed on about June 1, 1995. In about August 1995, there was a revision of the formal evaluation system. Each of the foregoing actions, as well as each of the ones in the preceding two paragraphs, were taken, the General Counsel, alleges without prior notification to the Union and, in consequence, violated Section 8(a)(5) and (1) of the Act.

Second, in connection with the evaluation system of July 1994, the Union made requests for copies of completed evaluations for unit employees, according to the amendment to the consolidated and amended complaint in Cases 18–CA–13178 and 18–CA–13344, from September 29, 1994. Respondent refused to honor those requests until January 1995. That almost 4-month delay, contends the General Counsel, constitutes an unlawful delay in furnishing relevant information to a bargaining representative, in violation of Section 8(a)(5) and (1) of the Act.

Third, the General Counsel alleges that, in or about June or July 1995, Respondent bypassed the Union and dealt directly with employees when it surveyed them concerning their preferences for hours of work, schedules, and shifts.

Finally, as to negotiations, themselves, the General Counsel alleges that Respondent generally bargained unlawfully, in violation of Section 8(a)(5) and (1) of the Act, by engaging in bad-faith and surface bargaining; by seeking to require that the Union make significant concessions and give up substantial benefits; by seeking to require the Union to abdicate its representational rights and responsibilities; by failing and refusing to offer meaningful counterproposals, compromises, or modifications, thereby displaying a take-it-or-leave-it attitude. And, more specifically, the General Counsel alleges that, by letter of December 23, 1994, Respondent unlawfully threatened to implement its final wage offer and, moreover, unlawfully implemented its last and final offer on about June 5, 1995, thereby reducing unit employees' wages and benefits, as well as changing their terms and conditions of employment, on both occasions without having explored fully possibilities for negotiating a collective-bargaining contract.

Given the number and diversity of these allegations, as well as the relatively extensive period covered by these allegations and the background relating to them, and, also, the intensity with which the negotiations were litigated, there is no even relatively simple way of presenting the facts in this case. For example, to try organizing them by type of allegation is to sacrifice the chronological significance and interrelationship among incidents, at least not without going over and repeating already covered events and events to be covered under other allegations. Conversely, a strict chronological presentation of facts buries review in an increasingly greater number of facts which, eventually, must be repeated to be grouped for discussion and analysis.

In the end, chronology appears to be the least worst alternative. In an effort to attempt to avoid confusion as facts are read, and an even more excessively prolonged analysis of them, however, two measures are being taken. Allegedly unlawful statements and alleged unlawfully motivated actions will be analyzed at the point of presenting facts underlying them, or in as close proximity as possible. This will leave the alleged bargaining violations for discussion in section II, infra, after the entirety of negotiations has been reviewed.

It is accurate that testimony and communications between parties are recited sometimes at length. Yet, this is primarily a table bargaining case. The proposals and counterproposals are important. So, also, are the explanations for them, as well as for the parties' conduct during negotiations. Their own words are perhaps better explanations for that conduct, than any attempt to paraphrase them. In any event, paraphrasing will only lead back to testimony and documents on review. Hopefully, by quoting evidence, the task of counsel and reviewer will be simplified, by not having to go back through the record to locate too much of what had been said on particular occasions.

The second measure, to minimize confusion while reading the factual presentation which follows, will be to set forth the basic principles governing table bargaining situations. In this way, the reader will have those guidelines in mind while reviewing the facts in succeeding subsections, rather than having to wait until the bargaining is analyzed in section II, infra.

Usually, table bargaining cases present the ultimate issue of whether a respondent has been trying to bargain in a manner

[8] The complaint in Case 18–CA–13632 alleged that, without prior notice to the Union, and without affording it an opportunity to bargain about the subject, Respondent changed its "Base Firm KW load level" on March 14, 1995, resulting in a lower threshold level at which the utility would request "peak alert" shutdowns of Respondent's Albert Lea facility. The General Counsel's motion to withdraw that allegation was granted. Nonetheless, that withdrawal did not encompass the allegation concerning "peak alert" shutdowns during 1994, as alleged in consolidated and amended complaint in Cases 18–CA–13178 and 18–CA–13344.

which will avoid reaching agreement, altogether. That is not the situation presented here. Prior to the representation election, Respondent had wanted to negotiate with a representative selected by its employees and had encouraged them to obtain such a representative. After that election, it made repeated and ongoing efforts to bargain with the Union. There is no basis whatsoever for concluding that Respondent had not been trying to negotiate and reach agreement with the Union on terms for a collective-bargaining contract.

Still, even a respondent wishing to reach agreement will be found to have engaged in unlawful bargaining if, in doing so, it is only willing to reach agreement upon preconceived terms—so called "take-it-or-leave-it" bargaining. "Respondent engaged in a pattern of conduct evidencing a preconceived determination not to reach agreement except on its own terms, irrespective of the Union's bargaining powers, approach, or techniques." *Pease Co*., 237 NLRB 1069, 1070 (1978). "It is thus clear that Respondent was unwilling to reach agreement except on its own terms." *Endo Laboratories*, 239 NLRB 1074, 1076 (1978).

It is on that overall theory which the General Counsel must prevail in the instant proceeding, if he is to prevail at all on the allegation that Respondent bargained in overall bad faith. Yet, analysis under that theory walks somewhat of a tightrope.

"More than in most areas of labor law, distinguishing hard bargaining from surface bargaining calls for sifting a complex array of facts, which taken in isolation may often be ambiguous." (Citation omitted.) *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 10 (1st Cir. 1981). What must be scrutinized is "the employer's conduct in the totality of the circumstances in which the bargaining took place." *NLRB v. Billion Motors*, 700 F.2d 454, 456 (8th Cir. 1983). That scrutiny, however, "need not and does not mean that we choreograph the dance," *Endo Laboratories*, supra, by "impos[ing] upon the parties any bargaining format, either substantive or procedural." *Pease Co*., supra.

Obviously, the first area to which attention must be directed is the substance of proposals and the extent to which they were "so consistently and predictably unpalatable to the other party that the proposer should know agreement is impossible." *NLRB v. Mar-Len Cabinets*, 659 F.2d 995, 999 (9th Cir. 1981). "Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adherred to." *NLRB v. Wright Motors*, 603 F.2d 604, 609 (7th Cir. 1979). For, "if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." *NLRB v. Reed & Prince Mfg. Co*., 205 F.2d 131, 134 (1st Cir. 1953).

At the same time, what must not be overlooked in conducting that scrutiny of proposals is that "the Supreme Court made it clear that the National Labor Relations Act does not regulate substantive terms . . . incorporated in a collective-bargaining agreement." *Management Training Corp*., 317 NLRB 1355, 1357–1358 (1995). In consequence, the Board does not "scrutinize bargaining proposals to see if they are sufficiently generous," *Modern Mfg. Co*., 292 NLRB 10 (1988), since "bad faith is not evidenced by a failure to . . . yield to a position fairly maintained." (Citation omitted.) *AMF Bowling Co. v. NLRB*, 63 F.3d 1293, 1301 (4th Cir. 1995).

Most significantly, in the instant case where Respondent was seeking concessions, "firmness in insisting on a position which if accepted would have reduced the employees' existing benefits cannot of itself be evidence of bad faith." (Footnote and citation omitted.) *Hamady Bros. Food Markets*, 275 NLRB 1335, 1337 (1985). Consequently, the fact that Respondent was seeking concessions, of itself, does not warrant the conclusion that its bargaining posture had been a bad faith one. See *AMF Bowling Co. v. NLRB*, supra, 63 F.3d at 1300–1303.

As to wage offers, the Board will not "scrutinize wage offers to see if they are sufficiently generous," *Prentice-Hall, Inc.*, 290 NLRB 646, 646 (1988), and, absent evidence to the contrary, will not treat a "first wage offer to be [the] last." (Footnote omitted.) *Captain's Table*, 289 NLRB 22, 24 (1988).

Similarly, a management-rights proposal evidences bad faith where it "would have required the union effectively to abrogate its representation of the employees," *NLRB v. Mar-Len Cabinets v. NLRB*, supra, or where it "essentially place[s] the Union in a position where simple reliance on the rights arising from its status as the majority representative would be more advantageous than" agreeing to the employer's management-rights proposal. *Modern Mfg. Co*., supra, 292 NLRB at 11. Nevertheless, "It is not unlawful for an employer to propose and bargain concerning a broad management-rights clause" (footnote omitted), *Commercial Candy Vending Division*, 294 NLRB 908, 909 (1989), especially if, as negotiations progress, the employer is willing to make "the exercise of management rights subject to the express terms of the contract," or to modify its "proposal at the Union's suggestion," or "to drop their management-rights if the Union made concessions in an area of interest to the" employer. *American Commercial Lines*, 291 NLRB 1066, 1079 (1988).

With regard to the bargaining unit, it probably goes without saying that scope of the bargaining unit should not be used as a "bargaining lever" to secure economic advantage. See *NLRB v. Sheridan Creations*, 357 F.2d 245, 248 (2d Cir. 1966). See also *McAx Sign Co. v. NLRB*, 576 F.2d 62, 68 (5th Cir. 1978). Still, "parties to a bargaining relationship may voluntarily agree to modify the scope of a Board-certified bargaining unit." (Citations omitted.) *Canterbury Gardens*, 238 NLRB 864, 864 (1978). See also *Seyncor International Corp*., 282 NLRB 408, 410 (1986), and cases cited therein.

As with any nonmandatory bargaining subject, see, e.g., Gaywood Mfg. Co., 299 NLRB 697 (1990); *Oil Workers Local 3-89 v. NLRB*, 405 F.2d 1111, 1117 (D.C. Cir. 1968), a party can propose modification of a bargaining unit. It is prohibited only from, absent "mutual consent, . . . insist[ing] on a change in the scope of an existing bargaining unit." (Footnote omitted.) *Chicago Truck Drivers (Signal Delivery),* 279 NLRB 904, 906 (1986); accord: *Bozzuto's, Inc*., 277 NLRB 977 (1986).

As to union security, "There are too many reasons why an employer who is willing to contract with a union might wish to . . . maintain an open shop." *K-Mart Corp. v. NLRB*, 626 F.2d 704, 706 (9th Cir. 1980) (quoting Cox, The Duty to Bargain In Good Faith, 71 Harv. L. Rev. 1401, 1419 (1958)). And, employers are "not required to agree to [a] dues checkoff provision[.]" (Footnote omitted.) *Commercial Candy Vending Division*, supra. Consequently, an employer's unwillingness to agree to either union security or checkoff is not a per se violation of its duty to bargain in good faith. It follows that neither is its proposals of no union security or checkoff.

A second area to which scrutiny is directed, to evaluate the presence of absence of good- or bad-faith bargaining, is the manner in which a party negotiates about proposals. As noted above, in connection with review of management-rights proposals, the extent to which a party is willing to modify, or to discuss modifying or even abandoning, its proposals supplies one factor in this area. *American Commercial Lines*, supra; *Genstar Stone Products*, 317 NLRB 1293, 1293 (1995).

Another is willingness to explain reasons for, and justifications advanced to support, proposals, and bargaining positions. "Patently improbably justifications for a bargaining position will support an inference that the position is not maintained in good faith." *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 409 (9th Cir. 1977).

A very significant factor in this area is a party's willingness to bargain about all subjects, as opposed to attempting to bargain about only a limited number of subjects, before proceeding to negotiations about other ones. Such conduct is referred to as "piecemeal" or "fragmented" bargaining. "It is well settled that the statutory purpose of requiring good-faith bargaining would be frustrated if parties were permitted, or indeed required, to engage in piecemeal bargaining." (Citation omitted.) *E. I. du Pont & Co.*, 304 NLRB 792 fn. 1 (1991). For, such an approach excludes "the opportunity to engage in the kind of 'horse trading' or 'give-and-take' that characterizes good-faith bargaining." *Endo Laboratories*, supra, 239 NLRB at 1075. Accordingly, a party may not refuse to negotiate about noneconomic subjects until agreement is reached on all economic ones. *Modern Mfg. Co*., supra. Nor, conversely, may it insist on completion of negotiations on noneconomic subjects before negotiating about economic subjects. *Eastern Maine Medical Center v. NLRB*, supra, 658 F.2d at 11. For, "progress in negotiations on certain economic and noneconomic subjects often induces parties to yield ground on other disputed subjects." Id.

A corollary to the proscription on piecemeal or fragmented bargaining is that parties may not declare piecemeal or fragmented impasses. An employer may not make changes in particular terms during negotiations until "overall impasse has been reached on bargaining for the agreement as a whole." (Footnote omitted.) *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). However, as is explained in that case, there are exceptions to that general proscription: where continued avoidance of, or delay in, bargaining about a subject is occurring and, second, where economic exigencies compel prompt action.

A third area of scrutiny, to determine whether bad-faith bargaining has occurred, is a party's overall approach to the negotiating process. For example, whether or not a party has been willing to meet at "reasonable times and places," *Genstar Stone Products*, supra; see also *Hassett Maintenance Corp*., 260 NLRB 1211 (1982); *Modern Mfg. Co*., supra, 292 NLRB at 11. Another factor is the degree to which a party "engaged in obstreperous conduct during the meetings calculated to deter consensus" or "engaged in frequent filibusters on collateral matters," *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993); but see *Preterm, Inc*., 240 NLRB 654, 655 (1977); and *Allbritton Communications, Inc*., 271 NLRB 201, 206 (1984).

A final area of scrutiny is a party's conduct which occurs away from the bargaining table. In evaluating the existence of bad faith, or the absence of it, during bargaining, "The Board not only looks to the employer's behavior at the bargaining table but also to its conduct away from the table that may affect the negotiations." *NLRB v. Billion Motors*, supra. Unlawful conduct outside negotiations can "[support] an inference that [a party] failed to bargain in good faith," *Radisson Plaza Minneapolis v. NLRB*, supra, by "establishing an intent . . . to frustrate agreement." *Genstar Stone Products*, supra. For, such away from the table conduct can "shed light on . . . motive" during bargaining. *Modern Mfg. Co*., supra.

Still, unlawful conduct away from the bargaining table does not determine conclusively that bargaining had been conducted in bad faith—does not necessarily "provide a sufficient indicia of bad-faith bargaining to warrant the finding of a violation in the circumstances of this case." *Hostar Marine Transport Systems*, 298 NLRB 188, 197 (1990), and cases cited therein. For example, a conclusion of bad-faith bargaining has not been mandated by such unfair labor practices as unilateral changes, *L. W. LeFort Co*., 290 NLRB 344, 345 (1988); *Brown-Graves Lumber Co*., 300 NLRB 640, 641–642 (1990); *Litton Systems*, 300 NLRB 324, 330 (1990), nor by direct dealing with employees, *River City Mechanical*, 289 NLRB 1503, 1505 (1988), nor by a one-time delay in providing requested relevant information. *Days Hotel of Southfield*, 306 NLRB 949 fn. 2 (1992).

Concomitantly, unfair labor practices away from the table do not, standing alone, preclude the existence of a valid impasse. That is, there is "no presumption that an employer's unfair labor practice automatically precludes the possibility of meaningful negotiations and prevents the parties from reaching good faith impasse." *NLRB v. Cauthorne,* 691 F.2d 1023, 1025 (D.C. Cir. 1982). Rather, to preclude impasse, there must be "a causal connection between the employer's unremedied change and the subsequent deadlock in negotiations." (Citation omitted.) *Intermountain Rural Electric v. NLRB*, 984 F.2d 1562, 1569–1570 (10th Cir. 1993). That is, if "unlawful conduct away from the bargaining table did not contribute to the deadlock in negotiations [that conduct does not serve] to prevent a lawful impasse." *Litton Systems*, supra. Indeed, where the parties genuinely deadlock on bargaining about one subject "of central importance," which is of "overriding importance," the existence of other unlawful bargaining subjects, even, will not bar impasse. *E. I. du Pont & Co*., 268 NLRB 1075, 1076 (1984). Accord: *Sacramento Union*, 291 NLRB 552, 554 (1988).

Finally, inasmuch as an evaluation of a party's good- or bad-faith bargaining requires analysis of the totality of the circumstances, the conduct of both parties must be scrutinized. For, a bargaining agent's own bad-faith bargaining may "effectively excuse[ ] the [employer's] obligation to bargain." *Seafarers Local 777 (Yellow Cab Co.) v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978). In the context of the statutory bargaining duty, this principle is not simply an application of the equitable defense of in pari delicto. Instead, a union's bad-faith bargaining can effectively obliterate "the existence of a situation in which [the employer's] good faith could be tested." *Continental Nut Co*., 195 NLRB 841, 845 (1972). "If it cannot be tested, its absence can hardly be found." *Times Publishing Co*., 72 NLRB 676, 683 (1947), quoted with approval more recently, *Chicago Tribune Co*., 304 NLRB 259, 260 (1991).

In the instant case, I conclude that only two statements were made which violated Section 8(a)(1) of the Act. The preponderance of the evidence does not establish unlawful motivation for any of the actions alleged to violate Section 8(a)(3) and (1) of the Act. The evidence does show that Respondent engaged

in some actions which constituted unlawful unilateral conduct and, also, did unlawfully delay in providing relevant information requested by the Union, all in violation of Section 8(a)(5) and (1) of the Act. However, those violations were isolated ones which neither tended to, nor had, any actual impact on the negotiations in the instant case. As to that bargaining, the evidence of what occurred during negotiations fails to establish that Respondent bargained in bad faith. Consequently, it did not violate the Act by implementing its last, best, and final offer.

One final prefatory point is necessary. By the time they testified, all of the principal witnesses for both sides, as well as several of the other witnesses, appeared to have developed a strong distaste for the opposing side and its supporters. As a result, it did not appear to me that any of those witnesses was testifying with complete candor. Instead, each seemed to be trying to tailor his/her testimony, to a greater or lesser extent depending on the particular witness, to fortify the position of the party he/she favored and to undermine the position of the opposing side. Accordingly, the testimony of no witness can be fully relied upon in attempting to reconstruct events.

Lack of candor particularly characterized the testimony given by staff organizer, Michael Kodluboy, and by boxing technician and unit chair, Frank Nellis. Both gave testimony that, at various points, was internally contradictory, inconsistent with testimony of other witnesses appearing on behalf of the General Counsel, unsupported and uncorroborated in meaningful respects, and at odds with objective evidence and considerations, as will be illustrated in succeeding subsections. Those factors revealed by reviewing the record reinforce my impression, formed as each testified, that neither man was being candid. Therefore, I place no reliance upon their testimony, at least where not supported by credible other evidence.

B. Relationship of Respondent to Bridon PLC Group

As described in subsection A, supra, Respondent is a corporation. It is a wholly owned subsidiary of Bridon American Corporation (Bridon American), located in Wilkes-Barre, Pennsylvania. It, in turn, is a wholly owned subsidiary of Bridon plc Group (Bridon Group), which is located in Doncaster, England.

Bridon Group owns several wire and wire rope manufacturing companies located in the United Kingdom. It also owns a fiber rope manufacturing facility and a number of distribution companies located in other countries. However, it regards its "core business" to be those companies which manufacture and sell wire and wire rope and, as well, those which distribute wire rope and associated products.

Bridon American is not regarded as one of those "core businesses." It wholly owns Bridon Group's subsidiaries located in the Americas. One of those subsidiaries is Respondent. Although a wholly owned subsidiary of Bridon American, until early 1992 Respondent had been managed for Bridon Group by British Twine Group (British Twine), another wholly owned subsidiary of Bridon Group and one which manufactured twine in England.

Bridon Group closed British Twine during 1992. It did so because British Twine was failing to meet Bridon Group's target percentage for annual return on average capital employed for noncore subsidiaries. That annual return target becomes a concept central to negotiations which eventuated between the Union and Respondent.

Bridon Group calculates annual return on average capital employed by dividing a year's operating profit (profit before deducting interest and other costs of funds) by average capital (inventory, accounts receivable, and accounts payable) for that year. It desired target for the resulting figure is set at 20 percent for noncore businesses. Respondent is regarded as a noncore business.

Like British Twine, prior to 1992 Respondent has been failing to meet the 20-percent annual return on average capital employed target. So, too, had been Bridon American. Rather than close both of them, as it was doing with British Twine, Bridon Group chose to continue owning and operating them both. Management of Respondent was turned over to Bridon American. To correct the ongoing failure to satisfy the 20-percent annual return target, management of Bridon American was entrusted to William Barton Rogers Hobbs, under a 16-month management contract between him and Bridon Group. He was charged with either turning around Bridon American's operations, to meet the target rate of return, or with selling its assets.

So successful was Hobbs in improving Bridon American's operations during succeeding months that he has continued as an officer of it. At the time of the hearing, he was serving as Bridon American's president and chief executive officer. He also was managing director for the North American Operations of Bridon Group.

C. Respondent's Operations

During 1976 Respondent opened for business. Approximately 80 percent of its operations at Albert Lea are devoted to manufacturing various sizes, colors, lengths, and labels of square and round agricultural baler twine. The remainder of operations there is devoted to manufacturing industrial products, such as undersea rope and extension cord fillers.

As might be expected, its business is seasonal. The primary selling season is during the fourth calendar quarter and the following January, as retailers stock product for sale during the April to August agricultural season. Respondent's second largest season occurs during the summer, as retailers attempt to fill in merchandise gaps.

Since 1988 Respondent has operated a small facility in Jerome, Idaho. That is the center of a large haying area. As a result, Respondent manufactures agricultural baler twine there. But, no industrial products have been manufactured at the Jerome facility.

In addition to selling within the United States, Respondent historically sold agricultural baler twine in Canada. It did so through Bridon Pacific, Limited, another subsidiary of Bridon Group. Bridon Pacific, Limited would receive title to the twine manufactured by Respondent, so that it was the importer of record, and then would execute the Canadian sales.

By 1992 there were four production lines at Jerome and six production lines at Albert Lea. The production process on each line is, in effect, performed by groups or teams of employees. Thus, at least at Albert Lea, a group of employees, rather than on or two individuals, is affected whenever a line is closed down at Albert Lea.

Ordinarily, at Albert Lea five or six products are manufactured at any time. Resins, mainly polypropylene pellets, are received there in bulk. From railroad cars in which it is delivered, resin is conveyed into the main building by a vacuum system and is deposited into silos. From there, it is conveyed

through a series of drying bins and overhead hoppers into extrusion line or mixing hoppers. Added in this process are other ingredients, such as stabilizers and coloring.

The resulting mixture is dropped onto extruder lines where extruders—15-ton pieces of equipment, 15-feet long by 6-feet high—heat the mixture under pressure. The heated mixture then passes through dry heads which press it into dies or sheets of varying sizes. After cooling, by being put into chill rolls or by being put through a quench tank, the sheets are run through a series of knife blades to cut them into tapes. Those tapes are put through orientation ovens to stretch, reheat, and align the molecules for added strength. The tapes are next fast-hauled and collected on a series of collectors into "beams" of approximately 150 pounds each.

Beams are then removed—"doffed"—from collectors, tested for correct weight and quality, and moved to the twisting area. There, tapes are twisted and wound into spools or balls of twine. That is sometimes still performed on SIMA twisters. However, 80 percent of the product is semiautomatically doffed, twisted, and spooled on Roblon machines which Respondent acquired during 1990. In either event, spools are automatically doffed and deposited in trays. Operators pull some twine from each spool to be certain it is feeding properly and so farms know from which end to pull.

Spools then are tagged and loaded onto an overhead conveyor which delivers them to the packaging or common boxing area. After removal from the conveyor, a film of shrink wrap is placed over each spool and melted onto the spool—shrink-wrapped—in a small oven. Afterward, spools are placed on a table where they are sorted, reweighed, and automatically or manually put into boxes which, when full, are taped shut and stacked on pallets. Each full pallet is moved to a stretch wrapper, covered by a thin film of shrink wrap to secure them, and moved from the main building to a separate building—a warehouse—for storage until pulled for shipment to customers.

Apparently, a similar process is followed at the Jerome facility. However, prior to 1994 only two of the four production lines there were being operated. Operation of those two lines was alternated, with each one being operated separately for 3-1/2 days each week. Throughout 1993, in addition to two administrative employees, between one and three employees, and between six and eight persons categorized by Respondent as supervisors worked at the Jerome facility. As a result, Jerome production was being conducted primarily by supervisors.

In contrast, from 1990 until March or April 1994, Respondent employed approximately 15 or 16 production and maintenance employees on each of four shifts at Albert Lea, for a total of 60 to 64 production and maintenance employees over the course of that somewhat more than 4-year period. Two shifts (denominated "red" and "green") were day shifts; the other two (denominated "blue" and "gray") were night shifts.

Shifts are 12 hours' long, to accommodate 24-hour-a-day operations at Albert Lea. Night shifts would alternate working 3- and 4-day consecutive shifts. Day shifts followed that same procedure. Thus, one day shift and one night shift would be working, while the other was off. Then, the two shifts would reverse and work the same number of consecutive days as had the other shifts.

Production employees on each shift work under the supervision of a shift supervisor. The four shift supervisors at all material times have been Wade Carlson, Lon Wright, Pam Tovar, and Susan Ulrich. They report to Production Superintendent VanKampen. During 1994 and for the first part of 1995, he reported to Production Manager Peter A. Johnson.[9] Johnson reported directly to Adams during 1994 and VanKampen began doing so from April 1995.

As to maintenance employees, Rick Fynbo is maintenance supervisor and, according to VanKampen, Eugene C. Pacovski is maintenance superintendent. For the first part of 1994, Kevin Miland occupied the position of materials manager. During the summer of that year he was appointed human resources manager. Ronald Drake has been operations manager and/or chief financial officer since August 1980. With the exception of Fynbo, it is admitted that each of these individuals have been, at all material times, statutory supervisors and agents of Respondent. As to Fynbo, he is not a unit employee, whatever his supervisory and agency status under the Act may have been. The same is true of Terry Yocum, who is responsible for quality control, of Mark Hultgren, who handles raw materials, and of Merle Froent, who handles electrical maintenance. Apparently, each of them is regarded as a managerial employee.

D. The Employee Committee

During 1976 an "employee committee" was formed at the Albert Lea facility, to provide communication between hourly paid production and maintenance employees and management there. At some point, through that committee, those employees began negotiating agreements with Respondent for terms and conditions of employment. The most recent one was executed on April 1, 1992, according to its section 20, "effective until April 1, 1993."

There is no particularized evidence that the 1992–1993 agreement had been extended or replaced by a new agreement. Apparently, ongoing negotiations for a succeeding agreement had taken place, with some type of informal understanding or series of understandings to extend the terms of the 1992–1993 agreement until a new one was negotiated. Both the employees and Respondent regarded the 1992–1993 agreement's provisions as being effective during early 1994.

In fact, during the hearing, both Respondent's officials and employees, as well as the Union, occasionally referred to that agreement in connection with employment conditions which they asserted did exist, as well as in connection with some proposals and counterproposals. As a result, some of its provisions must be understood to, in turn, assess certain other actions and statements during 1994 and 1995:

AGREEMENT

> Bridon Cordage, Inc., hereinafter called "Bridon," does hereby agree with its production and maintenance employees at its Albert Lea, Minnesota plant as follows:
>
> *Section 1. Employee Committee:*
>
> 1.1. There is hereby established an Employee Committee which shall consist of two production and maintenance employees selected by a majority vote of each of the four shifts. The employees of each shift have heretofore elected two employees to represent said shifts; said Committee shall serve for a period of six months (January 1–June 30, July 1–December 31). Election and reelection of

[9] During April 1995, Johnson moved to marketing and, in effect, his position was left unfilled, with VanKampen retaining his same job title, but also assuming Johnson's duties.

said employees shall be determined by a majority vote of all employees on each shift.

1.2. Said Employee Committee shall meet with representatives designated by Bridon at such times as may be mutually agreed upon between said Committee and the representatives of Bridon, provided there shall be a[t] least one meeting each calendar month.

Section 3. Wage Scale:

3.1. 1 April 1992—Beginning rate day shift, $9.72 per hour; beginning rate night shift $10.12 per hour. New hires will receive 50 cents increase in wages every six months until they reach the wage rate of regular employees:

Day Shift	$12.72 per hour
Night Shift	$13.13 per hour
Warehouseman	$10.72 per hour

3.2. All work performed over 10 hours in one day or over 40 straight time hours in one week shall be paid for at one and one-half times the employee's regular rate of pay.

Section 7. Seniority Acquisition:

4.3. Lay-off: In any reduction in work force, the last employee hired shall be the first laid off, etc., until the reduction is completed. In the event of a lay-off, Bridon will give two weeks notice to employees. On Call Back: Employees will be called back by seniority.

4.3.A In the event that an employee is displaced because of a layoff, he/she may choose their shift preference if seniority allows. If this action displaces another employee, that person also has the right to choose whatever shift his/her seniority allows.

4.3.B On call back, there will be no employee rights reserved for shift or position. Employees will fill whatever vacant positions are available.

4.4. Vacancies: In the event of a vacancy on any shift, the employee with the most seniority will be granted a transfer to that shift provided that such transfer does not unreasonably interfere with the efficiency of the shift from which he or she transfers.

Section 6. Maintenance:

6.1. In the selection of maintenance personnel, when possible, selection shall be handled by seniority bidding with requirements that the individual be qualified for the job on the basis of skill and ability.

6.2. There will be a designated maintenance person on each shift. This person will work the same schedule as the shift the employee is assigned to. This person's primary duties will be maintenance that is either scheduled or unscheduled. Wages will be the same as other production and maintenance employees as stated in the Bridon Agreement.

Section 7. Warehouseman:

7.1. In the selection of warehouse personnel, when possible, selection shall be handled by seniority bidding with requirements that the individual be qualified for the job on the basis of skill and ability.

Section 8. Tech Positions:

8.1. In the selection of a tech position, selection shall be handled by seniority bidding with requirements that the individual be qualified for the job on the basis of skill and ability.

8.2. There will be designated techs on each shift. These people will work the same schedule as the shift the employee is assigned to. These people will be given a list of general responsibilities specific to their area. Wages will be the same as other production and maintenance employees as stated in the Bridon Agreement.

Section 10. Vacations:

10.12. Vacations are not accumulative and whatever vacation time is not taken within the vacation year will be paid back to the employee at the employee's straight time pay rate. This payment will be made within one month after the end of the vacation year.

10.13. Two employees will be allowed to be on vacation at one time, January through December, except for the following circumstances: when two people on vacation at one time could severely interfere with production; during June, July, August, when summer help is available, three employees may be gone at one time.

Section 11. Sick Pay:

11.3. If requested by Bridon, employees will, at his own expense, furnish Bridon with a doctor's certificate as to said sickness or injury and as to employee's inability to work by reason thereof.

Certain points about that agreement, and operation under it, should be highlighted. First, it makes no provision for job classifications nor, concomitantly, for grades without job classifications. Second, under the above-quoted sections 3.1, 6.2, and 8.2, all employees on a shift, regardless of duties, would be paid at the same rate. Third, section 4.4 allows Respondent to consider "efficiency of the shift" in choosing employees to fill shift vacancies. Fourth, nothing in the agreement prevents Respondent's supervisors from performing production and maintenance work. Fifth, nor does anything in the agreement prevent Respondent from hiring temporary workers from outside agencies. Sixth, seniority governs layoffs and recalls. Seventh, nothing in the agreement requires that shifts be of any particular duration. Eighth, the agreement allows Respondent to defer payments for unused vacation time until 1 month after the end of the year. Ninth, Respondent can require an employee to provide a doctor's certificate when taking sick time. Finally, nothing in the agreement prohibits Respondent from evaluating employees' performance.

E. Initial Efforts to Improve Respondent's Rate of Return

Once Hobbs began managing Bridon American during 1992—and, therefore, began indirectly managing Respondent—as described in subsection B, he discovered that, while a profitable operation, Respondent had never achieved Bridon Group's 20-percent return target for a "noncore business." At that time Respondent's president was Tony Bower. He had served in that capacity since 1976.

After reviewing Respondent's situation, Hobb brought his conclusions to Bower's attention: that Respondent's Albert Lea inventory was too high, because more was being manufactured there than was being sold; that Albert Lea operating expenses—

particularly, its wage rates—were excessive; and, that both labor rates and transportation costs were significantly lower at Respondent's Jerome facility, which led Hobbs to conclude that production at Albert Lea should be decreased while that at Jerome should be increased.

Bower assured Hobbs that summer and winter seasonal sales would eventually absorb any then-existing excessive inventory. Indeed, there was initial improvement in sales after April 1992. Yet, that improvement was short lived. By fall, Bower's projection for summer sales turned out to have been overly optimistic.

As weekly summer sales reports had begun showing that Bower's projections were not going to be achieved, Hobbs commissioned an outside consulting firm—Bennecon Limited (Bennecon)—to review Respondent's situation. During September 1992 it submitted an operational review, concluding, inter alia, that Respondent could "achieve a sound level of profit and return in 1993 and beyond." To accomplish that, Bennecon recommended a number of actions.

Among short-term actions it recommended were either a "sell-out programme" or "production cut-backs," so that "year-end stocks" would be reduced; elimination of "rented outside storage at Albert Lea" (the warehouse), so that there would be no excess structures being used there; and, consideration of "eliminating one level of [Albert Lea] supervision," with personnel possibly being transferred to the Jerome facility. As medium-term actions, Bennecon recommended, inter alia, that Respondent study "increasing Jerome output" so that average Albert Lea stocks could be reduced; and, review of the "three cost areas" of packaging material, electricity usage, and transport costs to "identify cost reduction potential," as well as, "Utiliz[ing] outside assistance where necessary." Eventually, Respondent did follow some of those recommendations. Its doing so led to some of the unfair labor practice allegations described in subsection A.

Bower chose not to follow any of the Bennecon recommendations. During November 1992 Respondent's officials met with those of Bridon Group and of Bridon American to review the 1993 budgets. Bower advanced a 1993 sales forecast that was somewhat higher than 1992 sales. Especially in light of failure to achieve his 1992 projected sales levels, however, both Bridon Group and Bridon American officials were skeptical of that 1993 forecast. According to Hobbs, they pointed out to Bower that "Bridon [Group] was very concerned about the capital levels and their borrowing levels as a worldwide group, with the result that during 1993 . . . cash position of the [G]roup was more important than even the profitability, that it was absolutely critical he keep his capital in line, and that we would sacrifice profits for improved cash flow."

In that connection, testified Hobbs, Bower was told "that it was absolutely critical that he maintain the forecasted inventory levels and that if sales did not occur according to plan he had to reduce production to lower the inventory levels to make sure that inventory levels were in line with the plan that he had generated." Hobbs testified that Bower "presented a proposal to introduce a new premium product" and obtained approval for "an aggressive advertising budget" to promote Respondent's products, especially the new product.

Also discussed were what Hobbs and other officials viewed as a "massively dispropriationate" number of supervisors at Albert Lea "relative to the number of direct hourly employees." But, Bower protested that supervisors there "did a lot of production work and were absolutely critical to the production of the product."

As it turned out, Respondent returned only 8 percent on investment for 1992. Ordinarily, such a return would have led Bridon Group to sell Respondent, investing the proceeds in acquisitions which did generate the target return on average capital. Short of that, particularly in view of the Bennecon review, Hobbs testified that, during December 1992, he began thinking about replacing Bower. But, Hobbs ceased doing so when, during early January 1993, Bower inquired if Bridon Group would be interested in selling Respondent's assets to an investment group with whom Bower was speaking.

Bridon Group was willing to entertain an offer from the investment group with whom Bower was working. They eventually organized as American Costal Ties, LLC (ACT). In view of the changed situation, Hobbs, Bridon American, and Bridon Group decided to allow Bower to continue serving as Respondent's president, while waiting for an offer from ACT to purchase its assets.

Aside from providing background, the foregoing facts have particular significance for the complaint's allegations in two respects. First, they show that there had been recognition of certain conditions—excessive production generating excessive inventory at the Albert Lea facility, high wage rates there, lower costs at Jerome—even before the Union came on the scene and, indeed, even before Adams became associated with Respondent. Second, those facts—particularly the Bennecon operational review, the authenticity of which is not challenged—show that those conditions had generated certain suggested actions—reducing production at Albert Lea, increasing production at Jerome, reducing electricity usage—which also antedated involvement with Respondent by either the Union or Adams.

The natural response to those points is to question why—if those conditions had been so long known—Hobbs, Bridon American, and Bridon Group had not taken any of the suggested corrective actions before 1994. The answer is provided from a review of events occurring during and after May 1993.

F. Events During Summer and Early Fall of 1993

Notwithstanding ACT's interest in purchasing Respondent's assets, Hobbs continued to monitor Respondent's sales and inventory situation. By spring of 1993 it was clear to him that sales were continuing to lag behind Bower's projection of the preceding November. As a result, inventory was mounting, rather than declining, because production was continuing at an unreduced level. Indeed, by then, total inventory was at a level higher than had existed during late 1992.

Hobbs complained regularly to Bower about that situation. In May, Bridon Group's financial director, G. J. Beswick, sent a memo echoing those complaints, because, according to Hobbs, Respondent "at this time was one of the few companies that was significantly out of balance in terms of its cash required to run the business," leaving Bridon Group "in a very tight position vis-a-vis its cash position and its borrowings[.]" Nonetheless, Bower responded with ongoing optimism regarding prospects for Respondent's sales to increase as 1993 progressed.

Whenever Hobbs suggested alternative corrective measures, such as brief closure of the Albert Lea facility or temporary layoffs of some employees, to temporarily reduce production so that sales would absorb some of the accumulating inventory,

Bower responded that such courses might damage Respondent's business, thereby devaluing it and reducing the price at which its assets would be purchased.

Hobbs testified that he felt that such responses displayed a refusal by Bower "to do what I thought were logical . . . business decisions and starting in effect to threaten us with the negotiation," and, further testified Hobbs:

> By this point we had become as a group somewhat skeptical of Mr. Bower's ability to put together the financial resources to actually buy the business and I was beginning to wonder if he was not managing the business to devalue it in the eyes of the company so that at the time we finally got to the final negotiations he could say this business is a bigger loser than even you thought and therefore the price needs to be less. I was becoming quite skeptical that I had a conflict of interest in terms of operating this business for the benefit of Bridon on the one hand and for the benefit of Tony Bower and his investors on the other.

Nevertheless, by June, ACT had put together an acceptable offer for purchase of Respondent's assets, with the financing supposed to be in place by October 1993.

By the time of that offer, Respondent's sales were continuing below levels forecast by Bower during the preceding November. In consequence, ongoing production continued to add inventory and, concomitantly, to increase Bridon Group's cash commitment to Respondent. Given that situation, Hobbs decided to visit Albert Lea during June, for a firsthand inspection of the situation there.

With Hobbs came William Adams. The two men had met several years earlier, when Adams had been serving as vice president of finance for Bethlehem Steel Cable Division's wire rope facility in Williamsport, Pennsylvania, a facility which Bridon Group was then considering purchasing. By June 1993, Adams had been retained by Bridon American as a consultant, to work on certain finance and operations projects for Hobbs. The latter testified that he had decided to have Adams go with him to Albert Lea during June,

> basically for two reasons. One was to again review the wage situation and get his opinion of the wage rates and the second one was to again review the inventory situation which was from my perception massively out of control, and asked him for his personal opinion about both those areas.

While in Albert Lea, Hobbs and Adams inspected a local meatpacking plant. That inspection revealed that Respondent's wages were significantly higher than those at the meatpacking plant, while working conditions at the latter were less desirable than at Respondent.

During this visit, Hobbs discussed with Bower the increasingly adverse effect on Bridon Group's cash position of mounting inventory at Albert Lea, resulting from continuing production there at levels above sales. Inasmuch as 1993 sales continued to be lower than contemplated by that year's budget, Hobbs insisted that production be reduced by instituting one or more of several alternative measures: layoffs, slowing down production rate, shutting down one or more production lines, or temporarily shutting down the entire facility. In addition, Hobbs testified that, "[w]e talked at length about the idea of moving production from Albert Lea . . . to Jerome," where production and transportation costs would be less than in Minnesota.

One specific subject encompassed by those discussions was that of labor costs at the Albert Lea facility, especially in light of the visit to the meatpacking plant. Hobbs testified:

> I made it clear and had been making it clear that this was probably the one time I had the facts in my hand, that it was time we dealt with the wage issue in Albert Lea, that his costs were out of line with the rest of the industry. They were out of line with Albert Lea. They were out of line with my experience around the world in terms of wages for this kind of labor in this environment for that product, and told him that we needed to do something about it. The least painful was move production to Albert Lea—I mean from Albert Lea to Jerome but that we probably ought to tackle the wage issue head on.

According to Adams, who was listening to what Hobbs was saying, Bower protested that "the people haven't had anything for a couple of years, and I think they're really expecting something this year," by way of wage increases. However, Adams testified, Hobbs responded, "Geez, don't do anything without talking to me." Bower disregarded that instruction 2 months later.

Hobbs and Adams left Albert Lea believing that Bower would take some actions consistent with the above-described discussions. He did not. Although, in an August 18, 1993 letter to Finance Director Beswick, Bower did report that he had refrained from "hiring summer help to cover vacations of full time employees," he took none of the above-enumerated alternative actions suggested by Hobbs. Rather, he continued to optimistically forecast anticipated year-end, seasonal sales increases and, indeed, recommended that prices be reduced significantly to encourage them. Most significantly, during August Respondent conferred an across-the-board wage increase, retroactive to the preceding April, for all nonsalaried production and maintenance employees at Albert Lea, with agreement to additional increases during 1994 and 1995.

Needless to say, none of this was well received by Hobbs, nor by Bridon Group. By mid-August the latter was being forced to cover excess inventory amounting to almost $2 million. Still, there was reluctance to interfere in Respondent's affairs, given the approaching October financing date target for ACT's assets-purchase offer. That is, Bridon Group felt that Respondent's situation might soon cease to be its problem.

Nonetheless, some continued consideration had to be given to the ongoing situation at Albert Lea, both to try to preserve Respondent's value and, also, to lay plans for operating it should ACT fail to come up with the financing, leaving Bridon American to continue managing Respondent. Thus, Adams was dispatched periodically to Respondent, starting in August 1993, to try to oversee more closely for Hobbs what was occurring there.

Production Superintendent VanKampen testified that he had spoken with Adams during one of the latter's August trips. According to VanKampen, Adams pointed out that inventory levels were "extremely high" and so, also, were wages "relative to the community and our competitors." Adams said, testified VanKampen, "[T]hat things were going to have to be status quo until" the assets sale to ACT "went through or did not go through," but that in the latter event, Respondent would have to "lower the stock levels," reduce wage levels, lay off labor force, and transfer some production to the Jerome facility. With regard to the latter, VanKampen testified, "Adams

pointed out specifically that the Jerome facility was being under-utilized, operating at only 25 percent of capacity."

By Interoffice memo, dated September 15, 1993, Adams notified Hobbs that a review of Respondent's performance disclosed that sales continued to be below budget, that "discretionary spending, such as travel and entertainment" was absorbing any advantage from other savings, such as a reduced resin price, and that inventory had mounted to an over-budget level and would remain at that excess level even if forecast sales were achieved during the remainder of the year.

The foregoing events further show that, well before the advent of the Union's effort to organize Respondent's Albert lea production and maintenance employees, there had been concern about production exceeding sales and mounting inventory at Albert Lea, and consideration of reducing production there, of laying off employees as one means for doing so, of reducing wage costs there, and of increasing production at Jerome. Furthermore, those concerns and considerations—many of which are documented, without dispute about authenticity—were ones to which Adams had been privy. In fact, he was suggesting during 1993 at least most of the corrective courses which he eventually would pursue during 1994. So far as the evidence shows, the only reason no corrective actions were taken during the summer and early fall of 1993 had been the prospect of sales of Respondent's assets to ACT.

G. Appointment of William Adams as Respondent's Acting President

As it turned out, ACT was unable to provide proof of financing by October 1993. Bridon Group granted ACT's request for an extension for doing so until December 22, 1993. But, in light of that extension, Hobbs concluded that he had to take action to, at least, preserve Respondent's financial status.

He asked Adams to become acting president, which the latter agreed to do. Hobbs placed Bower "on special assignment," to allow the latter to "spend full-time . . . raising the finances so we could get the deal done and sell the business." Hobbs testified that he charged Adams with running "the business in the best way he knew how without jeopardizing the future sale of the business." As a practical matter, Adams could not have done much more, given ACT's reaction to Bower's removal.

By letter dated October 6, 1993, its lead negotiator notified Bridon Group's chairman that "any imprudent remark or negative connotation concerning" Respondent "could jeopardize both the bank's support for our acquisition and the anticipated community support for the project." Among "steps which will change the nature of" Respondent, from ACT's perspective, the letter specified, "Changing the wage and bonus structure of the company" and, "Requesting the resumes of all staff and questioning their continued employment[.]" Hobbs testified that he viewed this letter as, in essence, a warning not to change any of, at root, Bower's "management practices" or "it would greatly influence and hamper our ability to sell the business."

The accuracy of that conclusion was reinforced later that same month. ACT transmitted a communication, asserting that during the interval while financing was being finalized, "it is the interests of both parties to agree upon operating guidelines for [that] period so that the entities are run in the best interests of the business."

Two pages of "operating guidelines" were provided by ACT, with specific requirements enumerated under seven major headings. For example, under "Personnel," the guidelines provide that existing employment terms are to be followed, "Existing personnel to remain at current wage and benefit levels," staffing levels are to be maintained at existing levels, and consultation is to be conducted regarding any personnel reallocations and reassignment, as well as concerning new hire decisions. Under the general heading of "Production," levels of production are required to remain, in essence, at existing planned levels, with "Production decisions to continue to be made as currently." An apparent catch-all requirement is that, "[n]o significant changes to be made in the organization or its functioning or policies without consultation with ACT."

Given this situation, Adams testified that he was left as acting president with a role confined to safeguarding assets, preserving the business in a form that would not "foul up" the asset sale, and preparing a new strategic plan "to hit the ground running if in fact a transaction was not successfully completed." As part of that role, Adams was responsible for finalizing the following year's budget, approximately 85 percent of which had already been developed by Bower, for presentation at the annual November budget meeting in Wilkes-Barre, Pennsylvania.

One addition which Adams did make to that proposed budget was to "budget for the start-up of the Jerome plant," should the assets sale fall through, "to bring up the production level to what [he] considered the minimum practical level of operation for [it] and we were going to do that no matter what if we owned it." As described in subsection C, at Jerome only two of four production lines were being operated, each for only 3-1/2 days a week. That was resulting in a "heat penalty," a "scrap penalty" and a "yield penalty," as lines were stopped, then restarted and stopped again. Quality also suffered. Moreover, the supervisors there were becoming discouraged at having to continually perform production work, rather than performing at least a somewhat greater amount of supervisory-type work.

For 1994, Adams testified, "We budgeted to go to the 50 percent capacity which is running the two lines that had been running . . . 100 percent of the time" during the second calendar quarter. Then, to "bring up a third line . . . by some time in the fourth quarter," so that by year's end Jerome would be operation at "roughly 75 percent of its designed capacity with three o[f] four extrusion lines running 100 percent of the time." Charts submitted during that budget meeting do show a projected increase at Jerome to 16 full-time production employees and to four hourly maintenance employees during calendar year 1994, as well as for electrical usage there to increase from 77,000 units in 1993 to 206,000 units during 1994. Hobbs testified that this part of Respondent's 1994 budget was approved during the November 1993 budget meetings.

During a separate presentation to Hobbs, Beswick, and other officials of Bridon Group and Bridon American, in connection with the November 1993 budget meetings, Adams reported that should Respondent's assets not be sold, it had a reasonable opportunity during 1994 and 1995 of achieving the 20-percent return-on-average-capital-employed target. But, stated Adams, it could do so only if Albert Lea wage levels were reduced and if a shutdown or layoffs were effected there, to reduce production volume so that sales could absorb existing inventory plus whatever twine was manufactured at a lower production level.

During a meeting in London on November 25, 1993, Bridon Group's board of directors agreed that Hobbs should "report monthly on the management of" Respondent. Moreover, apparently following up on what Adams had reported earlier that

month, as set forth in the preceding paragraph, the directors concluded that, despite negotiations for sale of Respondent's assets, its manager would be "given a mandate to reduce costs, including wages which if reduced by one third could effect a saving of approximately $1.3 million per annum." But, with less than a month until the deadline for ACT to provide proof of financing, neither Hobbs nor Adams took any immediate action concerning Respondent.

The foregoing facts show continued concern about excess production, inventory, and wage rates at Albert Lea before the Union began organizing Respondent's employees. They further evidence the reason why Respondent did not act sooner to correct those excesses: risk of disrupting the pending sale of Respondent's assets, as was warned by ACT's communications. The most important fact shown by the events in this subsection is that, during the November 1993 budget meetings, a firm decision was made to increase Jerome production from 25 to 50 percent of capacity there during the second calendar quarter of 1994. As discussed in subsection N, infra, that was what did occur, albeit not until the first month of the third calendar quarter of 1994.

H. Appointment of William Adams as Respondent's President

By December 23, 1993, ACT still was unable to provide satisfactory proof of financing to purchase Respondent's assets. It requested a further extension of time to do so. But, Bridon Group removed Respondent from the market, deciding, according to Hobbs, "[T]hat it might come back on the market in October 1994 at which time we hoped that we could clean it up and make it more profitable so that again it was a more—a better company to sell."

Hobbs notified Adams that the latter "was now the permanent president" of Respondent and should start running its business in the most beneficial manner possible. That appointment occurred on January 27, 1994, at a time when Respondent was on the verge of losing its Canadian market.

As mentioned in subsection C, Respondent historically sold baler twine to customers in Canada, through Bridon Pacific, Limited. Those sales constituted approximately 22 percent of Respondent's annual total sales of agricultural baler twine. However, they had been a losing proposition.

That was so because Canadian sales were being made by Respondent at prices below the cost of manufacturing that twine. Adams testified, "[O]ver the four or five years that we had been selling up there, we actually sold at a cumulative net loss," but those sales "kept [Albert Lea] operations busy." That is, under Bower, Canadian sales at those prices were made, Adams surmised, as "a way of trying to balance inventory without having to adjust production" at Albert Lea—that is, without having to reduce the volume of Albert Lea production. No evidence was presented to controvert any aspect of that testimony by Adams.

Respondent's sales at those prices came to the attention of Canada's National Revenue, Customs, Excise, and Taxation Ministry during 1993. Initial investigation resulted in an October 1993 conclusion that there had been "dumping" into Canada by Respondent. However, it was further concluded that Respondent's dumping was not causing, nor was it likely to cause, material injury to domestic producers. That second conclusion was reversed by the International Trade Tribunal. In December 1993, it reached a preliminary determination that Respondent's dumping of twine "is causing or is likely to cause material injury" to Canadian producers.

While that December 1993 determination had been a preliminary one, it meant that exports of baler twine to Canada by Respondent would be subject to provisional duty, refundable if a final determination was contrary to the preliminary one. As a practical matter, the preliminary determination precluded Respondent from making further twine sales to Canadian customers, given the high tariff then to be imposed and the further fact that Respondent had been making Canadian sales at prices lower than production costs.

Obviously, losing access to the Canadian market magnified Respondent's problem of excess production over sales for 1994. The loss of that market did not have an immediate impact during January and February of that year, because those were not months during which a significant amount of Canadian sales occurred. Still, if December 1993's preliminary determination became a permanent one, then Respondent would lose access during 1994 to a market which had been providing 22 percent of its sales in years past. As will be seen in subsection J, infra, that is eventually what did occur.

The Canadian preliminary determination occurred while Adams was still serving as Respondent's acting president. But notice of it was received on the same day as ACT was giving notice that it could not provide proof of financing for purchase of Respondent's assets. So, Adams directed preparation of a comparative capability profile for the Albert Lea and Jerome facilities. As to his reasons for taking that action, Adams testified:

> At the point of even getting the preliminary Canadian ruling, I understand [sic] that the possibility of a very radical production plan for some period of 1994 was likely if not inevitable and I needed a reasonable assessment of what our capabilities under those circumstances would be. So, if we wanted to—Jerome was going to come up no matter what, and I need[ed] to know the capability and the cost of doing that, and what we were going to do at Albert Lea to take the inventory out. I needed to know just the benchmark at what the capability would be if all we had to work with was the management in production.

The profile is dated January 21, 1994. It estimates that Respondent could produce 65 tons per week with two crews, each consisting of six people, augmented by temporary personnel provided by outside suppliers, at Albert Lea. Adams explained that the two crews would be the total operators in manufacturing "and that's how many management we have" employed at Albert Lea. In other words, production at Albert Lea could be conducted only by supervisors and managers, augmented by temporary help provided by outside temporary labor firms.

On January 27, 1994, Adams conducted a meeting with Albert Lea management. One of the first points covered during that meeting was concern about Respondent's excess inventory. Adams testified:

> [T]hat based on where we finished the previous year that we had 800 plus tons of inventory more than we were supposed to have had, and [I] informed the management group that we're going to have to take those out of production during the year and that they were to begin developing solutions, i.e., taking down lines and left that with Peter [Johnson] and the group to begin developing options

for taking something over 800 tons out of the production plan for 1994.

As a practical matter, that excess represented "four full weeks of production if you [completely shut down all Albert Lea production] lines at the same time," testified Adams, or 8 weeks if only "half the lines" were shut down. In either event, or in the event of shutting down only one or three production lines, Adams testified that there would be periods of nonproduction when "we wouldn't need a substantial number of employees for a substantial period of time, so they would be home. They'd be laid off."

In a memorandum to Hobbs, dated February 9, 1994, Adams reviewed the situation at Albert Lea, as he saw it, and stated his proposal for action to correct that situation:

Current situation:

> We operate Albert Lea at 200+ tons per week. Near its capacity.
>
> Our labour rate in Albert Lea is about $21/hr fully loaded. This is at least $3 high for work requiring comparable skills in the area. We employ 50–52 hourly production workers.
>
> . . . .
>
> I believe that Jerome could be successfully staffed with labour rate $3.50 or more below Albert Lea's current rate.
>
> . . . .
>
> We have the option to move work to Jerome for economic reasons. However we have an obligation to negotiate in good faith with the organized work force at Albert Lea [the Employee Committee] and give them an opportunity to eliminate the economic differential before proceeding.

Proposed Actions:

> Open discussion with labour by 1 March 1994 with the goal of reducing weighted average fully loaded labour costs by $3/hour. Failure to reach a satisfactory agreement would result in the transfer of 50 tons per week of production to Jerome with a corresponding reduction in employment at Albert Lea.

By way of summary, Adams explained that he had "concluded it was time to move on trying to get a reduced labor rate at the Albert Lea plant[,] to getting Jerome up to at least a minimal level of operations, and if necessary planning to take full advantage of the Jerome facility."

As to the latter facility, acceleration to full-time operation of the two then part-time operating lines "had to be moved no matter what," Adams testified, "to bring them up to speed no matter what," both as an economic matter—"it was entirely unpractical to continue running the plant 3 days a week with only supervisors indefinitely, we couldn't retain our skills base, our quality was low, our yields were low, our scrap was high, our energy costs were high going up and down"—and because "the Jerome facility was closer to the markets that were served by that amount of tonnage[.]" Thus, production at Jerome would be increased from the then 25-percent capacity to at least 50-percent capacity.

With regard to increasing production at Jerome above the 50 percent of capacity level, according to Adams, such a decision was contingent on comparative production costs at Albert Lea. That is, he testified, "[I]t would ultimately largely be driven with the relative conversion cost structure of the two plants." At that time, he explained, "[T]he weighted average hourly payroll of Jerome is running just a little over $8.00 an hour, maybe 8.25, while at Albert Lea the base wage was 'maybe '$13.25 an hour,[10] made worse by the benefit package that goes on top. A lot of benefits run as a percentage of base wages, . . . so we're out $5.00 an hour on the base wage and then whatever the benefit package adds to that. It's a big number."

As to the effect on lowering that Albert Lea wage rate, by increasing production at Jerome, Adams pointed out in his above-described memorandum to Hobbs:

> Unsuccessful negotiations [with the Employee Committee] would still reduce labour costs by $100,000 per annum on the work moved to Jerome. The continuing pressure of the job loss should ultimately result in an improved agreement at Albert Lea eventually.

Once again, all of the events covered in this subsection occurred before the Union came on the scene at Albert Lea and, so far as the evidence shows, before any Albert Lea employee of Respondent even considered contacting an outside labor organization. Those events show continued concern about excess production and inventory at Respondent's Albert Lea facility, a concern magnified by the prospect of total loss of access to the Canadian market during 1994. Those events further show an ongoing belief by Respondent, specifically Adams, that wage costs at Albert Lea were too high. Indeed, at no point has it been disputed that wages at Respondent's Albert Lea facility had been set at rates which exceeded comparable area and industry rates, as well as being above wages then being paid in Jerome.

In addition, the events in this subsection reveal a continued firm determination to increase production in Jerome, by full-time operation of two production lines then operating there at half capacity. In light of that evidence, as well as the evidence regarding the Jerome facility in subsection G, there simply is no basis for concluding that the Union's eventual representation of Albert Lea production and maintenance employees somehow motivated Respondent's decision to increase production at Jerome to 50 percent of plant capacity there.

Beyond that level of operation, Adams did appear uncertain during early 1994 as to how much further production at Jerome should be increased. The February 9 memorandum shows that, to Adams, there was a direct relationship between such a decision and the extent to which wage reductions could be negotiated with the Albert Lea employee committee. Still, there is no showing that, in formulating that relationship, Adams had been acting out of hostility or animus toward the employee committee, nor toward employees for being represented by it.

So far as the evidence discloses, Adams was doing no more than recognizing a relationship based solely upon comparative economics at the two facilities. Of course, the Act does not absolutely prohibit employers from relocating—nor from considering relocating—to a lower cost geographic location from a higher cost one, even if those higher costs result from negotiated wage rates and benefits. In that respect, his February memorandum to Hobbs demonstrates that Adams was fully prepared to negotiate with the employee committee to try to

[10] In fact, $13.12 an hour.

lower Albert Lea wage rates and, inferentially, avoid relocating any work from there to Jerome.

To be sure, as he stated in the final above-quoted portion from that memorandum, Adams recognized that if job losses occurred at Albert Lea because Jerome production was increasing, then Albert Lea employees likely would become more agreeable to wage concessions. Yet, mere recognition of that incidental affect does not render unlawful an otherwise lawful motive. At best, it merely acknowledges a negotiating strength based upon leverage arising from an economic reality.

No one disputed that Jerome wage costs were lower than at Albert Lea. There is no evidence that the late 1993 and early 1994 decisions to increase production at Jerome had not been motivated by that economic reality. There is no evidence of any consideration to accelerate Jerome production because of an unlawful motive, such as hostility toward the employee committee and its supporters. A mere recognition that the latter's wage concession decisions may be influenced as a consequence of relocation, for solely an economic advantage, does not operate backward to somehow taint that solely economic motive—to convert it into an improper one, because one of its incidental affects may be to influence employees' willingness to negotiate concessions.

The events in this subsection further show that, even before the Union came on the scene, Respondent was contemplating certain other actions which would eventuate in a decline in the volume of Albert Lea inventory. No one disputed the authenticity of the profile. It shows contemplation of at least a temporary reduction in force—layoffs—at Albert Lea. To continue limited production there, Adams contemplated both supervisors performing production work and, also, having some of that work performed by temporary help supplied by outside agencies. That latter course was not a novel idea. As described in subsection E, it had been one of the medium-term actions recommended by Bennecon in its September 1992 operational review. And having supervisors perform production work, as was already being done regularly at Jerome, would effectively reduce a level of supervision, as Bennecon also had recommended.

If Adams had intended to take those actions, the natural question is why he did not do so before April 1994—why he had not acted sooner after assuming presidency of Respondent on January 21, 1994. After all, ACT was no longer on the scene to bar him from doing so and, as quoted in subsection G, Adams had wanted "to hit the ground running if" ACT was unable to secure financing to purchase Respondent's assets.

I. Initial Meetings with the Employee Committee and Notification by the Union of Its Organizing Campaign

The reason for delay was the presence of the employee committee and its Agreement with Respondent, as described in subsection D. During October 1993, Adams had contacted Attorney James Ohly, then affiliated with the firm appearing as counsel for Respondent in the instant proceeding. At that time, according to Ohly, Adams had explained that Respondent was "going through a sale process but they also had some problems if the sale didn't go through that they had to deal with," concerning high wages and high production at Albert Lea, low production at another plant in Idaho, and "inventory that was too high[.]" Of course, the fact that Adams had discussed these subjects with Ohly as long ago as October 1993 is further evidence that Respondent did not suddenly raise them upon learning of the Union's organizing campaign.

When shown the 1992–1993 Agreement, Ohly testified that he was unsure "what it was," and that Adams was concerned about "how to deal with the employees," in light of the apparent existence of some type of bargaining relationship and of the expressed desire "to move to Idaho. . . . to change the wage structure. . . . to go back to contracting out some of the work. He wanted to know how to deal with the employees."

Ohly was concerned both as to whether the employee committee was even a statutory bargaining representative and, if so, as to whether there had been an element of employer domination during its relationship with Respondent. Neither subject has been litigated in the instant proceeding.

After discussion with some of Respondent's managers, during November 1993, Ohly advised Adams "to play it safe and deal with" the employee committee. Adams followed that advice after becoming Respondent's president. But, he remained concerned about its true representative status and about Respondent's vulnerability to eventual charges of, at least, employer interference with the employee committee. In consequence, he testified that, because he intended to propose concessions, and wanted to avoid such charges, he desired that Respondent's employees select "a new committee, get them to come forward, explain to them the situation, go through notification and whatever effects discussions needed to take place and get that transfer [to Jerome] on the road."

As quoted in subsection D, section 1.2 of the Agreement provides for monthly meetings between Respondent and the employee committee. The first such meeting after Adams became Respondent's president occurred on Wednesday, February 2, 1994. The employees attending were Laverne Phillip Wolff, Rich Winchmann, Kathy Jean Vokoun, Michael Draayer, and Tim Randall. Attending for Respondent were Production Manager Johnson and Production Superintendent VanKampen.

VanKampen acknowledged that, during this meeting, there had been no discussion of operational changes which Adams had been discussing with supervision—no discussion of subjects such as layoffs or increasing production in Jerome. In fact, VanKampen testified, it had not been his intention to discuss those subjects on February 2, but rather to merely raise the general subject of Respondent's competitive position, leaving the particularized concessionary items for later discussion during actual negotiations, as opposed to a regularly convened monthly meeting. In that respect, VanKampen testified, without contradiction, that "when we were going to renegotiate contracts[,] [t]hey would put in different people to do the negotiating." That is, he testified, employees other than the committee members—"Usually the big guns. . . . People that are not scared to say what is on their mind and argue for the employees"—would appear to conduct negotiations on behalf of the Albert Lea employees.

The minutes of this meeting were prepared by VanKampen. Their accuracy is not contested. To the extent pertinent, they show that employees were notified that Adams was unwilling to agree to the terms of the agreement which the employee committee had been negotiating, apparently with Bower, and that Respondent intended to "meet with you in the not to [sic] distant future to discuss the Agreement;" that Respondent intends "to keep costs as low as possible," including by "send[ing] people home" if everyone could not be kept busy by

the product mix; and, that competitors were selling their products at "$1 or $2 less a bale," with the result that "to stay in business," Respondent's employees would have to work more efficiently by eliminating rework, scrap, rewinds, out-of-spec beams, and machine downtime, but that, "[i]f we do not succeed, *everyone of us* will be without employment."

Laborer Draayer testified that, by the time of this meeting, "[E]verybody knew," from "rumors," that "we had a lot of inventory," that "it was a possibility that some people might have to get sent home," and "that other companies were coming in quite a bit lower than us on our prices and that it was too expensive for us to make twine and that some changes would have to be made." That is, he further testified, "[E]verybody was aware that there was something going on and that it might not be very good."

During this meeting, some questions were asked by the employees. One involved hourly paid employees being sent home—which VanKampen testified, without dispute, had been occurring "on a fairly regular basis if there was not work available"—while management personnel remained working, by "helping out in production." According to VanKampen's notes, he replied, "That is the way I have always expected our management people to work . . . and by a Management person helping clear out a bottleneck in production, we all benefit with a lower conversion cost." In other words, if nothing else, supervisors had remained to do production work on occasions where employees were being sent home for lack of production work to perform.

The next regularly scheduled monthly meeting between the employee committee and Respondent took place on Wednesday, March 2, 1994. During it, employees were informed that Respondent wanted to meet with representatives of the employees to renegotiate an agreement. VanKampen testified that he suggested to the employees that "since we were looking at a concessionary situation, that they get a professional negotiator." During that meeting, he further testified, he had identified wages as one area to which Respondent was looking for concessions, but there is no evidence that he made mention of layoffs, nor of transfer of production to Jerome.

Boxing Technician and Unit Chair Nellis agreed that Respondent had "repeatedly" suggested to employees that it would be a good idea for them to get someone to negotiate on their behalf. Some employees, at least, eventually followed that suggestion and decided to seek representation by the Union.

By letter dated March 10, 1994, Staff Representative Kodluboy notified Adams that "a number of employees . . . have formed an organizing committee under the banner of the [Union], . . . for the purposes of organizing a production and maintenance (P&M) unit in your facility." The names of six employees were recited in that letter.

Kodluboy's letter continues, "upon receipt of this correspondence, a status quo exists on all matters concerning wages, hours, and conditions of work in your Albert Lea facility." Neither he nor any other representative of the Union testified that, in letters giving notice that an organizing campaign is in progress, it was usual or normal practice for the Union to give a warning to employers about maintaining the status quo. Usually, warnings in such letters are directed to discrimination against employees. Further, Kodluboy never explained his reason for having included that "status quo" warning in this particular letter.

Adams testified that he had been pleased to learn that Respondent's employees might become represented by a Steelworkers local. Both he and his father had been members of that labor organization. He had represented Pennsylvania management during negotiations with Steelworkers local unions there. Indeed, Kodluboy acknowledged that he had spoke with East Coast Steelworkers colleagues and that they had said good things about Adams. In fact, in his brief, counsel for the General Counsel, in effect, concedes that Respondent—and Adams, in particular—was not hostile toward the concept of unionization of its employees, nor toward the possibility that they might become represented by the Union. Obviously, these facts are inconsistent with any argument that Respondent had been motivated by intent to discourage union activity in taking the actions which it did during the following month.

Of course, as of March 10, 1994, the Union was merely attempting to organize Respondent's production and maintenance employees. It had not become their exclusive bargaining agent. Nor was there any particular basis for assuming that it would succeed in becoming so. Rather, to the extent that there was a bargaining agent for those employees at that time, it was the employee committee. And that point was made to Kodluboy by Adams, in a letter dated March 15, 1994.

In that letter, Adams acknowledged having received Kodluboy's March 10 letter and states that Respondent desired "that the employees be represented by the organization of their choice." That latter statement is uncontradicted by any evidence concerning events during March or before that. In his letter, Adams continues:

> You should, however, be aware that the bargaining unit is currently represented by a labor organization. Further, there is currently a collective bargaining agreement in effect. Importantly, [Respondent] and the current bargaining unit are in the process of negotiating a reopener. To the extent that these negotiations change the terms and conditions of employment, [Respondent] cannot comply with your request to maintain the status quo.

So far as the record shows, the Union did not respond to that letter.

Asked if he had received that March 15 letter, Kodluboy equivocated. Ultimately, he answered, "I can't remember it." Initially, he answered, "I'm trying to recall it, because it must have came [sic] to me if it's addressed to me, but in the intervening time [Staff Organizer] Keith Grover took over as the organizer, so I'm sure if I received it at that point I must have handed it directly to him." Yet, though Grover would later correspond with Respondent, as the organizing campaign progressed, there is no evidence that he ever communicated with Adams concerning any of the above-quoted statements in Adams's March 15 letter. Moreover, though there was no evidence or representation that he was not available to testify during the instant proceeding, Grover never appeared as a witness to testify as to whether he had or had not received that March 15 letter.

Following the March 2 monthly meeting with the employee committee, Respondent continued to request that the employees select a representative with whom it could meet and not be accused of domination. The purpose for such a meeting, VanKampen testified, was "to move negotiations along, by being able to discuss the problems [Respondent] was having." Adams testified that, "I was under the impression it would hap-

pen fairly quickly, but not until several weeks dragged on did a committee ultimately . . . present itself and [say] they were prepared to meet with me on March 23, and so I scheduled a meeting with them."

J. Events of March 23, 1994

Before meeting with the employee committee on March 23, Adams learned, that same day, that there had been a final determination by the International Trade Tribunal. It upheld the preliminary determination, described in subsection H. As a result, Respondent would no longer be able to continue selling agricultural baler twine in Canada at prices which it had been charging customers there. Of course, that meant that until it could lower its manufacturing costs, Respondent effectively had lost that market for approximately 22 percent of its total annual sales.

Against that immediate background, Adams met with the employee committee on March 23. It is not disputed that the employees who appeared for the committee had represented to Adams that they "had been selected by the employee group as a whole to represent" all employees. Once the meeting commenced, however, their representative status became less clear.

Among the employees attending that meeting was Greg McKane. He, along with Nellis and Jeff Campbell, would become employee-members of the Union's team which negotiated with Respondent from mid-1994 to mid-1995. When Adams asked during the meeting if the committee members were certain that they represented "a clear majority" of their coworkers, in light of the Union's March 10 letter, it is not contested that the employees replied that they were not certain of that. In the end, testified Adams, "[M]y impression was they didn't know if they did have a clear majority support anymore."

That equivocation concerned Adams because, he testified, "I felt some urgency to get going" on negotiations, given the ongoing high production costs at Albert Lea, compared to lower production costs at Jerome and, also, given the harm to Respondent's competitive situation resulting from having deferred any actions on changes over the past year, while waiting to learn whether Respondent's assets would be sold. As a result, he went ahead with the meeting and provided certain information to the employee committee representatives in attendance.

He informed them that Respondent would be asking for "a reduction in the amount of compensation that you receive," given the comparatively high labor rate being paid to production employees at Albert Lea. He explained that Respondent had 2000 tons of surplus inventory stored in the warehouse, that Respondent was now foreclosed from selling to Canadian customers, and that Respondent had lost business in the United States because its twine sells "at a $2–$3 premium," thereby foreclosing it from competing in some low price segments of the labor market." He pointed out that production was not the only area to which Respondent would be looking to reduce costs. For example, it is uncontroverted that he mentioned, "[w]orking with the electrical company to reduce the utility costs," but emphasized that "[t]he largest remaining cost is labor which needs to be revised."

In that respect, Adams said that the "cost of an employee at the Albert Lea factory is $22 per hour." During a question and answer session—after Adams had left the meeting—with Johnson, VanKampen, and Operations Manager Drake, one or another of those supervisors said that Respondent had sold less agricultural baler twine in the United States during 1993 than it had during 1987. When an employee asked about how much of a reduction Respondent would be seeking in labor costs, he/she was told, "Some where in the upper teens."

While still at this meeting, Adams identified several steps affecting production which Respondent would be taking, or was considering taking, to improve its situation. He announced that there would by layoffs. According to the meeting's minutes, prepared by VanKampen and not contracted by other evidence, Adams said, "[W]e have no choice but to lay off some employees. It is very possible that these people will not be returning anytime soon," and that "the initial nine employees will be off for an extended period of time and possible [sic] never return." Asked if there would be additional layoffs, Adams replied, "It looks like things will get a lot worse before they get better. This will mean more layoffs." Asked how many additional employees would be laid off, Adams answered that he was "[n]ot sure at this time. Most likely another 8 to 12 people. Hopefully these people will only be off for a few months." In response to another question, Adams said that salaried people would not be laid off "at this time." During the question and answer session after Adams had left the meeting, Johnson said that layoffs would be made by seniority—which, of course was required under section 4.3 of the Agreement, quoted in subsection D—but that he did not know when the next group layoff would occur.

Also discussed by Adams during this meeting was the Jerome facility and the relationship between increasing production there and wage costs at Albert Lea. Adams pointed out that Respondent had "been putting off dealing with" the "$2–$3 premium" at which its twine had been selling, with the result that it had not dealt with "a 2000 ton inventory of product and idle plant in Jerome" and was concerned that "if we do not increase the output of Jerome we will lose our remaining skill base" there.

"How much we increase Jerome's production will be determined on how quickly we can come to a compensation agreement here in Albert Lea," said Adams, adding later that, "[i]f we can not get a quick agreement with the Albert Lea employees, I will have no choice but to transfer jobs and equipment to Jerome where the costs of production are far less then [sic] here. At this time no final decision has been made." A few minutes afterward, Adams reinforced those remarks, saying:

> How much production do we move to Jerome and what business we are going to go after is up to you. If we can find ways to lower our cost, and quickly, we will be able to keep more jobs here in Albert Lea.

The General Counsel alleges that these remarks about Jerome and reducing wage costs in Albert Lea violated Section 8(a)(1) of the Act, because they convey a message that support for the Union would be futile. I do not agree.

Since 1992 there had been concern about, among many subjects, high wages at Albert Lea and underutilization of the Jerome facility, where wage rates were significantly lower. As described in subsection E, Hobbs had complained about both subjects to Bower and Bennecon's operational review had recommended "increasing Jerome output." Adams had been asked to accompany Hobbs to Albert Lea during June 1993, as described in subsection F, because Hobbs had suspected that wage rates were comparatively too high. Their visit to a local meatpacking plant there led them to conclude that Respon-

dent's wages did, in fact, exceed community rates and Hobbs said as much to Bower.

During the November 1993 Wilkes-Barre budget meetings, discussed in subsection G, Adams stated that wage levels at Albert Lea needed to be reduced to achieve the target 20-percent return on average capital invested. His memorandum to Hobbs dated February 9, 1994, partially quoted in subsection H, articulated a direct relation between the extent to which Jerome's production would have to be increased and the extent to which reduction of Albert Lea labor costs could be negotiated.

The foregoing events all took place before Respondent had any idea that the Union was trying, or would try, to organize Albert Lea production and maintenance employees. Consequently, whatever argument may be made about Adams's credibility, those 1992 through early 1994 events—some of which involve documents, the authenticity of which is not challenged—demonstrate that the idea of relocating production to Jerome, if Albert Lea wage costs could not be reduced, was not an idea which suddenly arose when Respondent learned that a union organizing campaign was in progress. Moreover, those events show that Respondent, specifically Adams, had already formulated an intention to relocate production to Jerome, if Albert Lea costs could not be reduced, before learning of the campaign.

To be sure, nothing had been said about it to Albert Lea employees before March 23, 1994. Yet, so long as ACT's offer remained viable, through most of 1993, there was nothing that Adams, Hobbs, Bridon American, or Bridon Group could, or wanted to, do to change Respondent's operations, especially given the ACT communication described in subsection G. Certainly, nothing was to be gained by discussing what during 1993 were nothing more than plans which could not be implemented, especially as those discussions might cause ACT to send additional complaining communications.

Once the possible assets sale collapsed, Respondent was able to make changes which had been identified as necessary for over a year. However, Adams did not simply implement any of those changes. Instead, he attempted to give notice about them to, and negotiate with, whatever representative truly represented Respondent's production and maintenance employees at Albert Lea. As set forth in subsection H, not only did VanKampen encourage the employee committee to "get a professional negotiator," to negotiate on behalf of the employees for what appeared to be "a concessionary situation," but Nellis acknowledged that Respondent had "repeatedly" suggested that the employees retain a negotiator. Consequently, there is no basis for concluding that Respondent, particularly Adams, rejected the collective-bargaining process or was hostile toward employees for attempting to negotiate about employment terms and conditions.

Despite those efforts to persuade its Albert Lea employees to select a negotiator, no one was made available until March 23. To be sure, there had been monthly meetings with the employee committee. But, it is undisputed that, historically, different employees usually conducted negotiations than those who appeared for the employee committee at monthly meetings. Moreover, there is no basis for inferring that on February 2, or even on March 2, Respondent could have anticipated that employee committee negotiators would not make themselves available until March 23. Consequently, the fact that Respondent did not happen to relate its concerns and contemplated corrective actions to the employee committee until after learning of the Union's campaign does not, in these circumstances, disclose any impropriety. Nor does it provide a basis for inferring that remarks during the March 23 meeting had been motivated by that recently announced campaign.

The status of those employees with whom Adams met on March 23 cannot be simply ignored. They were not some collection of employees assembled by Respondent for Adams to address. They were serving as negotiators for an entity with which Respondent had been negotiating for almost two decades—and, at least arguably, with which Respondent was obliged to continue negotiating. That a union gives notice of intent to organize an employer's employees does not, of itself, serve to oust an incumbent representative. It is undisputed that the March 23 meeting had been convened at the request of the employee committee's negotiators. In light of that request, even though Respondent had been aware of the Union's organizing campaign, no impropriety can be inferred from the fact that Adams met with employees representing themselves as negotiators for the employee committee.

Of course, once that March 23 meeting commenced, those employee-negotiators began equivocating as to whether or not they truly represented all of Respondent's Albert Lea production and maintenance employees. Indeed, Adams freely acknowledged that, as the meeting progressed, he became concerned that those employee-negotiators "didn't know if they did have a clear majority support any more." Still, as the representative of an employer, Adams did not enjoy a prerogative of interfering with employee choices concerning their representatives. That is, he was not at liberty to compel employees to choose particular employees to represent them, nor even to delve too deeply into the representative status of persons claiming to be negotiators for the employee committee.

Certainly, so far as the record discloses, there was no basis for Adams to refuse to continue the meeting. There had been no clear showing during that meeting that those employee-negotiators were not the chosen representatives of the employee committee. At no point during the March 23 meeting, so far as the evidence shows, did any of them disavow true representative status. Nor did any of them seek to withdraw from continuing to meet with Respondent, on behalf of the employee committee. Accordingly, no impropriety can be based upon the fact that Adams continued to meet with the employee-negotiators on March 23.

In doing so, Adams promoted, rather than displayed the futility of, the collective-bargaining process. That is, he honored whatever obligation existed for Respondent to notify its employees' representative about proposed changes. Specifically, he related the longstanding concern about high labor costs at Albert Lea and related Respondent's contemplation of production relocation to Jerome if the Albert Lea wage costs could not be reduced. As reviewed above, concern about those high costs, and contemplation of relocation to Jerome, had been subjects discussed for over a year by Adams, Hobbs, Bridon American, and Bridon Group. Mention of them was factual. Moreover, both pertained to unit employees; the first to the cost of wages and benefits received by them, the second as to a possible production relocation which would affect their continued employment.

High Albert Lea labor costs, of course, had resulted from previous negotiations and agreements with the employee committee. Given the apparent status of the employee committee as

still the representative of Albert Lea employees during March 1993, it was the proper entity to which Respondent should have addressed discussion of reducing labor costs and possible relocation of production. For, it was the entity which, at that time, could agree on behalf of Albert Lea production and maintenance employees to whatever concessions would be needed to save those employees' jobs, by avoiding a need for Respondent to relocate to save on labor costs.

It is accurate that Adams did not divulge on March 23 all facets of Respondent's decisions in connection with Jerome. That is, he did not mention that there already had been a firm decision to increase production there, later that year, to 50 percent of that facility's capacity. Still, as set forth in subsection G, that decision had not related to Albert Lea's labor costs. Rather, it was a decision based solely on operational consequences of underutilizing production facilities at Jerome. As a result, it was not a decision which could be influenced by negotiations with the employee committee.

The contrary was true concerning the extent to which Jerome's production might be increased beyond 50 percent of that facility's capacity. That decision would be influenced directly by the extent to which Albert Lea's labor costs could be reduced. So, although he may not have explained to the employee committee's negotiators on March 23 all decisions pertaining to increasing Jerome's production—did not furnish them with, as it were, a bill of particulars regarding operation of that facility—Adams did provide the information pertinent to Albert Lea's negotiations. Accordingly, no impropriety can be inferred from his omission of a decision about Jerome which was not subject to influence by bargaining between the employee committee and Respondent. In any event, there is no allegation that Respondent bargained unlawfully with the employee committee.

Nor can an expression of futility be inferred from the fact that Adams informed the employee committee's negotiators that resolution of high Albert Lea's labor costs had to be achieved "quickly," to avoid job losses there. Such a remark is the type of "puffing" or "bluster" that not uncommonly accompanies demands and representations made during negotiations. Of itself, use of that word hardly conveys an inherent meaning that bargaining about a subject will be futile. To the contrary, it naturally conveys the meaning that bargaining for resolution must be conducted expeditiously. Certainly, the Act does not disfavor expeditious conduct of negotiations.

Furthermore, it cannot reasonably be inferred that Adams was seeking to reach resolution of labor costs "quickly," so that it would no longer be an issue were the Union to become the representative of Albert Lea's production and maintenance employees. There is no direct evidence that such a concern had influenced Adams during March 1994. Moreover, Adams appeared to have believed, based upon his background and prior relationships with Steelworkers and its locals, that he would have no trouble reaching agreement with the Union, were it to become the representative of Albert Lea employees.

In these circumstances, it reads too much into a single word—"quickly"—to assume that it reveals an underlying intention to avoid bargaining later about a particular subject, by resolving it before later opportunity to bargain about it can arise. Nor is there any basis for concluding that an employee would naturally draw such an inference in the circumstances of the instant case. Therefore, I conclude that the evidence fails to establish that Adams violated Section 8(a)(1) of the Act by his remarks to the employee committee's negotiators on March 23, 1994.

Before departing the events of March 23, the related testimony of one other employee should be considered, because it relates to what had been said by Adams about Jerome. Boxing employee Charles Joel claimed that he had attended a March meeting between Adams and Respondent's employees during which, he claimed, Adams had said, "[I]f we didn't accept what they were offering that they were going to start the plant up in Idaho." Obviously, that is a remark which, if made, constitutes a step beyond the statements attributed to, and admitted by, Adams during the March 23 meeting. But, there is no evidence to support Joel's testimony regarding such a remark.

In the first place, there was no other evidence of any March meeting between Adams and Respondent's employees, other than the one with the employee committee's negotiators on March 23. Joel had not been one of the negotiators who had attended that meeting. Accordingly, it is difficult to conclude that there actually been any March meeting which Joel really did attend.

Second, further questioning demonstrated that Joel did not have very much of a memory of what had been said at that supposed March meeting. He testified that Adams had said, "[T]hey wanted to ship some machinery out there or they were going to ship—or they were going to ship some machinery out there." However, he was not certain if Adams also had said that Respondent wanted to increase the production level at Jerome. Nor did he remember if Adams had said that the Jerome facility was not being fully utilized, or was under utilized, and did not recall if Adams had said anything about production at the Jerome plant. Yet, as shown in this and preceding subsections, these aspects of the Jerome facility were ones that ordinarily accompanied Adams's comments about that facility.

Given the absence of corroboration for Joel's description of such a March meeting with Adams, and his inability to recall any remarks by Adams other than ones which he regarded as improper, I place no reliance on Joel's account of this supposed meeting and of Adams's purported statement during it. As discussed in greater detail in subsection L, infra, Joel was not a credible witness and I do not credit his account of remarks by Adams during a supposed March meeting with employees.

K. The First Three Group Layoffs and Related April Events

On March 24, 1994, the day following Adams' meeting with the employee committee, Respondent issued 2-week layoff notices required by section 4.3 of the Agreement, as quoted in subsection D, to nine employees: Julia Drake, Diane Snyder, Dana Farrell, Tim Randall, Leah Marie Adams, Rod Dawson, Richard Wichmann, Kathy Jean Vokoun, and Jon Conway. None of these employees were among the six names recited in Kodluboy's March 10 letter to Adams, described in subsection I, concerning the "organizing committee." Further, they were the nine least senior production and maintenance employees at Albert Lea. Accordingly, their selection conformed to section 4.3 of the Agreement.

Consistent with Adams' remarks about that layoff during the prior day's meeting, each of those layoff notices stated, "Due to the economic conditions and the large stock of inventory, the following employees will be placed on long-term lay-off effective 6:00 AM April 11, 1994." This would be the first of a total of four group layoffs which occurred through May 23, 1994,

followed during the summer by periodic recalls of some laid-off employees and, then, repeated layoff of some of them. Eventually, all laid-off employees, save for four who quit while laid off, were recalled by mid-October, in time to work on production for Respondent's fourth calendar quarter-January primary selling season, as described in subsection C.

To fill any production gaps created by those ongoing layoffs, as at Jerome, Respondent used supervisors and managers to perform that production work. They did so with increasing regularity after each group layoff. Furthermore, Respondent increased temporary help obtained from Cedar Valley Services, a nonprofit organization which places its clients—developmentally disabled adults—with local businesses for temporary work assignments, as discussed below.

As pointed out in subsection I, the General Counsel does not contend that Respondent has been hostile to the concept of unionization of its employees, nor to selection of the Union as their bargaining representative. Instead, with respect to the foregoing subjects, as well as others discussed in succeeding subsections, the General Counsel argues that Respondent's alleged discrimination had been motivated by an intention "to pressure employees to accede to Respondent's unlawful bargaining demands," by, in effect, "'lock[ing] out' its employees in increasing numbers, in order to force the Union to accept whatever Respondent demanded at the bargaining table." To be sure, this is an accepted theory of unlawful motivation. Where applicable, it establishes the type of motivation for employer action which is "inherently destructive" of employee rights and violates Section 8(a)(3) and (1) of the Act. See, e.g., *R. E. Dietz Co*., 311 NLRB 1259 (1993); and *Branch International Services,* 310 NLRB 1092 (1993). However, events leading to the April 11 layoffs, announced on March 24, undermine application of that motivation theory to the facts existing here.

Foremost among those events is the absence of any evidence that, as of March 24, Respondent could fairly have anticipated that the Union would, in fact, become the bargaining agent of Albert Lea's production and maintenance employees. Kodluboy's March 10 letter named only six employees as being on the organizing committee. That is only about 10 percent of the nonsalaried employees then employed at the Albert Lea facility. No evidence was adduced that, as of March 24, Respondent possessed knowledge that any significant number of additional employees, much less a majority of them, were supporting the Union's campaign. Accordingly, there is no basis for concluding that, as of March 24, Respondent could foresee a need to plan for future negotiations with the Union—could foresee that a majority of Albert Lea's production and maintenance employees would actually select the Union as their bargaining agent and that Respondent had better start laying off employees to prepare for eventual bargaining with that labor organization.

The evidence also refutes any notion that, as of March 24, Respondent had been disposed to take action to interfere with the process of bargaining with an employee representative. As set forth in subsection I, Respondent had been encouraging its employees to select a representative untainted by any past employer domination or interference. And, as set forth also in that subsection and in subsection J, Adams had been readily willing to meet with the employee committee, once a group of employees appeared and, at least initially, claimed that they represented their coworkers. In short, prior to March 24, 1994, Respondent, particularly Adams, displayed a ready wilingness to observe the collective-bargaining process, by meeting with an entity which then had been the arguable and historic bargaining representative of production and maintenance employees at Albert Lea. And, in that regard, Respondent neither announced nor effected any layoffs prior to that March 23 meeting.

True, Respondent did announce the first group of layoffs on the very day after that March 23 meeting with an employee group who, as that meeting progressed, displayed some uncertainty as to their true representative status. Yet, as pointed out in subsection J, at no point during that meeting did any of those employees disavow his/her representative status, nor seek to interrupt that meeting to confer further with their coworkers. Rather, they continued to participate as employee committee negotiators. Moreover, at no point did those negotiators seek to bargain with Respondent about the layoffs announced by Adams, nor did they even protest layoffs being made.

There is no allegation that Respondent violated the Act by failing and refusing to bargain with the employee committee. On March 23, Adams gave notice to the employee committee of intent to layoff employees. No request to bargain about layoffs was made, in response, by the employee committee—neither during the March 23 meeting, nor at any point afterward. In those circumstances, the Act did not oblige Respondent to further stay its layoff hand until some action was taken by the employee committee in response to the announcement made to its negotiators.

Leading into that March 23 meeting, as set forth in subsections E through H, layoffs had been one course contemplated at Albert Lea, to slow production and allow accumulated inventory to be absorbed. To be sure, in schedule G of its October 1992 Operational Review, discussed in subsection E, Bennecon had cautioned against "Shut-downs," other than as "a last resort," in view of "the apparent loyalty and motivation of personnel at Albert Lea, including hourly employees." Still, that report had issued during a month when Respondent was entering its primary selling season. Obviously, that was not a good point during the year to shut down the facility or even to lay off some employees there.

By March 24, 1994, 1-1/2 years had elapsed since Bennecon had issued its operational review. During the interim, production had continued unabated. Hobbs and Bridon Group had expressed increasing concern with Respondent's mounting inventory. And layoffs had increasingly become a desirable corrective course being suggested by Hobbs, as discussed in subsection F, and by Adams, during the November 1993 budget presentations as described in subsection G, and in his profile of January 21, 1994, reviewed in subsection H. Those events—many of which are documented—dispel any argument that layoffs had been a course of action abruptly considered as a result of notice to Respondent that the Union was trying to organize Respondent's employees and, further, to compel acceptance of concessions by the Union, in the event that it actually became the Albert Lea employees' bargaining agent.

During the March 23 meeting, as described in subsection J, Adams told the employee committee negotiators that layoffs would be occurring, that the initial nine employees would be laid "off for an extended period . . . and [possibly] never return," and that there likely would be more layoffs. The layoffs announced during the following day corresponded with that notice.

In sum, a preponderance of the credible evidence fails to support an allegation that the decision to effect the first group

layoff—announced on March 24 for April 11, pursuant to section 4.3 of the Agreement—had been motivated by an intent to eucher the bargaining process, in general, or some future possible bargaining relationship with the Union, in particular. Nor is such a motivation shown by events arising from that group layoff decision which led four employees—Leah Adams, Vokoun, Dawson, and Conway—to eventually quit.

As quoted in subsection D, section 10.12 of the Agreement with the employee committee provided that pay for unused vacation time is paid annually within 30 days of calendar year's end. However, if employment is severed, that pay, as well as contributions for pensions, can be received immediately.

Each of the employees scheduled for layoff on April 11 received a letter, dated March 29, 1994, from Doris Schafer, Respondent's administrative manager, which began, "As a former employee of" Respondent. Enclosed was "the Traveler Termination form" for release of pension funds. In addition, Vokoun testified, without contradiction, that she had been told by both Schafer and by her shift supervisor, Pam Tovar, that she would be able to obtain her unused vacation pay shortly after the layoff. Similarly, Leah Adams testified that, during the week before her layoff, VanKampen had told her that, "[a]s far as he knew," the laid off employees would be receiving their vacation and retirement pay. Dawson testified that he had been told by VanKampen that the layoff would be permanent. Quite clearly, such statements do indicate to an employee-reader or -listener that her/his layoff is, in reality, a termination.

Still, it was not disputed that a notice from Production Manager Johnson "RE: Vacation Pay," dated April 11, 1994, had been posted that day in the Albert Lea facility. It recites:

> According to the existing employee agreement, unused vacation pay is to be paid at the end of the year. Thus, vacation pay earned in 1993 will be paid of December 31, 1994, and unused vacation pay earned in 1994 will be paid of December 31, 1995.
>
> Hopefully, most employees who are on lay off will be back to work before the first date is reached. They would then be eligible to use it or get paid for it.

Obviously, the years stated after "December 31" in that notice are inaccurate. But, there is no evidence that those stated years had been anything other than inadvertent error. Indeed, when he testified, Johnson still seemed not to fully appreciate that those years in his notice were erroneous. In any event, its second paragraph makes the specific point that recall is an anticipated event for the laid off employees.

Vokoun acknowledged having received a letter from Schafer, dated April 15, 1994, explaining that pension contributions can be withdrawn only "upon termination or resignation of an employee," and offering to provide Vokoun with a "withdrawal form" to obtain funds she wished to withdraw. However, the first paragraph of that letter refers to Vokoun "as a lay off [sic] . . . employee." And in a letter to her from Adams, dated April 26, 1994, Vokoun was informed:

> We have contacted the Minnesota Department of Jobs & Training regarding the issue of retraining assistance. We have agreed on a layoff status which will both preserve your recall rights with [Respondent] and maintain your eligibility for retraining assistance.
>
> In addition, should you elect to sever, we are told that you will not lose your eligibility for unemployment compensation. In this case you would receive your unused 1994 vacation pay, but would give up your rights to recall. This would not bar your re-employment at some future point. You would simply start as a new employee.

Clearly, that correspondence shows that Respondent did not regard any of the employees laid off on April 11 as discharges. Leah Adams conceded that she had received a letter similar to the above-quoted one sent to Vokoun. But, she testified, "I really did not believe that we were going to go back to work," and so, she eventually resigned to receive her unused vacation pay and pension contribution refund. That, also, was the choice made by Dawson, Conway, and Vokoun.

No doubt the totality of the foregoing communications to the first group of laid off employees displayed and created a certain amount of confusion concerning their prospects for recall. Yet, there is no evidence that the situation had been malevolently motivated. April 11 had been the first occasion when Respondent ever had laid off employees. Given their unfamiliarity with that process, it is not surprising that there would be some confusion among Respondent's officials as to how layoffs should be effected. That confusion would only be magnified by circumstances where, as Adams informed the employee committee's negotiators on March 23, the employees laid off might "never return" to employment with Respondent. Indeed, in the circumstances, that was a distinct possibility.

Even if, as is argued, Respondent had been attempting for some reason "to avoid [its] obligation to pay [accumulated] vacation pay" to those nine employees laid off on April 11, that would not violate the Act. Nor would it convert the four resigning employees to constructive dischargees, absent evidence of motivation unlawful under the Act. There is no allegation that Respondent violated a bargaining obligation owed the employee committee in connection with disposition of accumulated vacation pay. If Respondent had been attempting to evade state law in that regard, that still would not give rise to a violation of the Act.

More importantly, any effort to persuade or compel employees laid off on April 11 to quit would not, necessarily, buttress a theory of "lockout" to compel a bargaining agent to acquiesce in an employer's eventual demands. Any such unlawful motivation conclusion would have to be based on existence of an unlawful motivation for the underlying layoff. For, under any unlawful motivation theory, there is no evidence that leading those four employees to quit had been either an independent objective of Respondent, nor that it had been an independently anticipated consequence of having chosen to layoff employees on April 11. Thus, only if the circumstances of the April 11 layoff warranted a conclusion of unlawful motivation could it be said, in turn, that the four employees' resignations had constituted constructive discharges. As concluded above, however, a preponderance of the credible evidence does not establish unlawful motivation for the April 11 layoffs.

Furthermore, as Leah Adams acknowledged, those four resigning employees appear simply to have not believed that they would ever be recalled or, at least, to have made a choice to resign in order to obtain their vacation pay at a time earlier than if they waited until the one specified by section 10.12 of their then-representative's Agreement with Respondent. That certainly was a choice available to them. But it is not one which, under the Act, then allows their resignations to be converted to constructive discharges. Therefore, I conclude that the April 11 layoffs were not motivated by an consideration proscribed under Section 8(a)(3) and (1) of the Act and, further, conclude

that the resignations of Leah Adams, Dawson, Vokoun, and Conway were not the result of any motive proscribed by Section 8(a)(3) and (1) of the Act.

A like conclusion follows upon review of the evidence pertaining to the two succeeding group layoffs. It did appear that, when testifying about the layoffs, Adams overstated Respondent's situation, in an effort to try fortifying its position during the hearing. Still, even without regard to his testimony, the credible evidence fails to establish unlawful motivation—specifically, intention to "lockout" employees to compel union acceptance of proposals which Respondent might advance should bargaining eventually occur—for any of the two group layoffs after April 11.

During the monthly meeting with the employee committee on April 6, Respondent announced that "a very slow summer" was anticipated, with the result that more layoffs would likely occur. Of course, that announcement merely repeated Adams's statement, during the March 23 meeting, that it looked like more layoffs would follow the first group layoff. During the April 6 meeting, one employee mentioned a rumor that as many as 20 more employees would be laid off. It is uncontroverted that this remark provoked the answer that there would be more layoffs should "the market situation" not improve, but that Respondent was "not sure how many more will be off."

It should be kept in mind that, during January of 1994, as set forth in subsection H, Adams had told Albert Lea's management that the inventory excess represented "four full weeks of production if" the Albert Lea facility were to be closed completely. Of course, the April 11 layoffs did not constitute full closure of that facility. Magnifying the existence of an already excessive amount of inventory was the loss of access to the Canadian market, representing approximately 22 percent of Respondent's total annual sales. Accordingly, it hardly is inherently incredible that, despite any reduction in production resulting from the first group layoff, additional reduction in production would be needed.

Certainly, Respondent might have more efficiently achieved its objective of reducing inventory by simply laying off all production employees on April 11. But, as noted above, that group layoff had been the first layoff in Respondent's history. So, it hardly can be said that Respondent's officials were experienced in the effects on production of laying off employees. They testified that Respondent had intended to proceed incrementally with layoffs, to try to ascertain the affects on production of each. That is not an inherently illogical course. Beyond that, the Board's administrative law judges are not empowered to substitute their "subjective impression of what [they] would have done were [they] in the Respondent's position." *Hallmark & Son Coal Co*., 299 NLRB 259, 260 fn. 7 (1990).

Furthermore, the second group layoff was announced by notice dated April 11: "The following employees will be laid off effective 6:00 PM on Monday, April 25, 1994." So far as the alleged unlawful motivation for it is concerned, the second group layoff was not much different from the first group layoff. Respondent had notified the employee committee—on March 23 and, again, on April 6—that ongoing layoffs were likely. The employee committee had never requested to bargain about them, nor even objected to laying off employees.

With regard to the Union's organizing campaign, by April 11 there must have been a representation petition filed, since an election was conducted near the end of April. Nevertheless, that petition did not confer representative status on the Union. Nor did it mean that the Union would inevitably become the representative of Albert Lea's production and maintenance employees. Furthermore, based upon his prior dealings with Steelworkers local unions, Adams appeared confident during March and April that there would be no problem negotiating concessions with the Union, to achieve the needed reduction in inventory and the level of profitability sought by Bridon Group. Certainly, there is no evidence that he contemplated any particular difficulty in doing so.

That confidence turned out to be hubris, rather than reality. Yet, it did appear to be an attitude that Adams genuinely believed to be realistic. Indeed, he appeared truly shocked when subsequent events revealed that his initial expectations had been erroneous. But, during the spring there is no evidence from which an unlawful motivation, such as that advanced by the General Counsel, can be inferred. And, of course, there is considerable evidence of longstanding concern about the need for inventory reduction and, as one means of accomplishing it, of intention to lay off employees at Albert Lea.

Unlike the first group layoff, notices for succeeding group layoffs made no mention of a "long-term layoff." There was one other difference. Seniority was not followed strictly in making layoffs after the first group layoff on April 11, despite section 4.3 of the Agreement. Inasmuch as all Albert Lea's production and maintenance employees were paid at the same rate, there never had been a need for employees to seek promotion to higher skilled jobs there to receive a higher pay rate. In consequence, some more highly skilled jobs were populated by less senior employees who, in fact, became more highly skilled than their more senior colleagues.

Not illogically, its witnesses testified that were Respondent to have continued strictly following seniority when laying off employees after April 11, then Respondent would have been deprived of more highly skilled employees and left with employees who did not know how to perform their more highly skilled duties. So, Respondent decided to skip over those employees for layoff, when selecting employees to be laid off after April 11.

Of itself, that decision does not demonstrate unlawful motivation. There is no evidence that Respondent's highly skilled employees had been less favorably disposed toward the Union, or more flexible about concessions, than less skilled ones. Indeed, Nellis, who eventually became chair of the Union's bargaining committee, was allowed to keep working throughout the layoff period.

Of course, the General Counsel's unlawful motivation theory is that Respondent had been attempting "to use the layoffs as leverage to force the Union to accede to its unlawful demands at the bargaining table"—had been trying to interfere with the bargaining process. If so, that would demonstrate that Respondent had been indifferent to the principles of collective bargaining. In some respects that proved to be true, as discussed in section II, infra. Yet, after making the decision to skip less senior, but more skilled, employees, Respondent observed what was then the collective-bargaining process to which it apparently was subject. It gave notice to the employee committee before implementing that decision to not layoff such employees.

At the April 6 monthly meeting, it is undisputed that Johnson and VanKampen said that "the Technician jobs will not be part of the next layoff," because "these jobs are considered key positions that would disrupt production if they were elimi-

nated." In fact, the employee committee was also notified that, because of that change, Respondent intended to repost "the Gray Night Boxing and Extruder Tech jobs in case other people would have been interested in these positions," given the layoff selection change.

True, there is no evidence that Respondent's officials actually offered to bargain with the employee committee about this change. On the other hand, there is no evidence that any of the employees then representing the committee asked to bargain about the seniority changes after being given notice about it. And, there is no evidence that Respondent would not have been willing to do so, had the employee committee asked to bargain about it. Accordingly, there is no basis for concluding that selection of more senior, less skilled employees for layoff, while exempting more skilled employees from layoff selection, displayed animus toward the Union or displayed a disregard of the bargaining process.

Nellis made an effort to supply such a connection or, at least, to show that VanKampen had used the change, as a touchstone, to intimidate employees. However, his effort was not persuasive. He testified that on approximately April 24, he had asked VanKampen, "[W]hy people were being laid off out of seniority." According to Nellis, VanKampen retorted, "You should have expected this when the union came in." The General Counsel alleges that VanKampen's retort violated Section 8(a)(1) of the Act.

VanKampen testified that he did not recall ever having been asked by Nellis why employees were being laid off out of seniority. He denied having ever talked to Nellis about the layoffs and denied ever having told Nellis that he should have expected that people would have been laid off out of seniority when the Union came in.

In connection with this allegation, two points should not be overlooked. First, as of April 25 the Union had not "came in." The election would not begin for 3 more days. The ballots were not tallied until April 29.

Second, as must be obvious from some events and statements reviewed in subsection I, Respondent had been encouraging its employees to select a bargaining representative with which Respondent could deal, free of the possible taint of employer domination. Further, Adams was pleased that a Steelworkers local might become that bargaining representative, given his personal past relationship with that labor organization's locals.

More specifically, VanKampen had recommended that the employees "get professional help to negotiate the contract." Nellis did not deny that, on one occasion while leaving the lunchroom, he had been told by VanKampen to "get unionized." Indeed, Nellis acknowledged that on different occasions, he had been told by VanKampen that the latter "was in favor of the union" and, in one instance, thought it was a good idea.

The foregoing considerations tend objectively to reinforce VanKampen's denials that he had made such antiunion remarks to Nellis, as the latter claimed, and, further, to objectively refute Nellis's testimony that VanKampen had done so. As set forth in subsection A, Nellis was not a credible witness. The foregoing considerations serve as one illustration of the unreliability of his testimony—tend to show that he was trying to construct a case against Respondent when testifying, rather than to accurately recreate events and conversations as they actually had occurred. I do not credit Nellis's testimony concerning the supposed statements by VanKampen on approximately April 24.

Discussion of the April 6 monthly meeting should not be concluded without covering one other topic raised that day, though its significance does not become apparent until subsection N, infra. It is uncontroverted that the employee committee was informed that a formal training program would begin on the following Thursday "to try to improve production consistency on and between shifts. A separate ability test will be given to special job functions." In addition,

> [w]e also have been instructed to start an employee evaluation program. At this time we still are working out the details to this program. When it is complete the Supervisor will be filling out evaluation sheets every stretch and placing them into a file. Once a month we will go over the sheets with each employee.

A third group of employees were given notice on April 18 that they would be laid off, "effective 6:00 AM on Monday, May 2, 1994." Of course, by that latter date the representation election had concluded. The April 29 tally of ballots had shown that a majority of Albert Lea's production and maintenance employees had voted in favor of representation by the Union. Still, a preponderance of the credible evidence does not show that the May 2 group layoff had been motivated by any consideration other than the ones which had motivated the earlier two group layoffs.

Even if, by April 18, Respondent had anticipated that the Union would prevail in the representation election, a fact that is not actually shown by the evidence, there is no evidence demonstrating that, by April 18, Adams had been any less confident of persuading the Union to agree to concessions than he had been earlier that same month. Nor, given the longstanding inventory excess and recent confirmed loss of the Canadian market for approximately 22 percent of Respondent annual sales, is there evidence that Respondent had a lesser need for total production reductions by mid-April, than earlier that same month or during the preceding ones. In sum, there is no credible evidence establishing that the group layoff announced on April 18 had been other than another incremental part of an ongoing effort to reduce total production at Albert Lea, to allow sales to absorb inventory.

The foregoing conclusion tends to be reinforced by certain undisputed remarks made by Adams to all employees in late April, during meetings convened by Respondent. As to Jerome, he said that that facility was underutilized, was a "geographically correct" one for serving western markets, and that Respondent would "have to address" the issue of possible relocation of equipment there. Asked when Respondent planned to do so, Adams answered, "This is an option but we have no plans now—it is on the list of things to discuss." Presumably, he meant "to discuss" during negotiations, since no other possible discussions involving employees were planned, so far as the record shows.

Adams was asked also if the May 2 group layoff would be the last one. He replied, according to VanKampen's unchallenged notes of the meeting, "We don't know. We do not anticipate bringing hourly down to 0 for any period of time. I can't say we wouldn't go down to Techs for some time. There will be some effect on how fast we work off our inventory and how fast Jerome will be up."

A related question led Adams to provide an explanation for exempting techs, though less senior, from selection for layoff. Adams explained that when Tech Vokoun had been laid off on April 11, "none of the remaining 3 Techs had any knowledge of spool test" and were having to be trained. Thus, he said, while techs and maintenance employees were not exempted altogether from layoff, "there must be a balance within job classifications we keep." He also pointed out that Respondent had "sold in Canada at break even and . . . to keep the plant running so we didn't have to lay off people." Of course, that sales opportunity was foreclosed by late April.

In that connection, it is uncontroverted that, during those meetings, Adams reviewed Respondent's general economic situation: loss of the Canadian market, continued loss of market share to domestic producers, loss of industrial business, underutilization of the Jerome facility, and "a pretty grand build up of inventory." As to that latter subject, Adams said that Respondent could "not go on making product forever" and could not "make product for no one to buy."

During the question and answer session, Adams said that while Respondent "did not lose business last year it also did not make its profit budget" and would "attempt to maintain a level of inventory equal to sales." A question about what return was being sought elicited his reply, "On this business, to be a viable part of the business portfolio today, 20 percent—if we can't return 20 percent on the business it should be liquidated. 20 percent of the capital invested."

Adams also addressed specifically Respondent's view of labor costs. He said that those at Albert Lea were "not competitive" and that "every expended hour is $23.00." Asked if Respondent intended to "classify jobs" and if "the pay rate [will] be in different tiers," Adams answered that both were bargaining items. He pointed out that, in Respondent's view, "the wage package is out of line with the area" and that, had wages and benefits not been increased so much in the first place, "you just never would have gotten to that high level to begin with."

To questions about vacation pay for laid off employees, Adams responded, "As a legal matter we are not obliged to pay vacation pay until the end of the year," and that vacation pay for them was a "bargainable issue." But, when that was pursued, by an employee's protest that "we have families to support," Adams said that he would have consider that situation, as he had not known that it would arise and did not know the extent of his authority concerning it.

Questions also were raised concerning recalls. Adams said that before hiring any new personnel, Respondent was legally obliged to extend a recall opportunity to laid-off employees and that there was no reason not to recall them. Asked when that would occur, he answered, "You produced more than you sold—last year—I am not going to bring people back to fill up the warehouse, we will have to have new markets to bring people back." And, later, he said, "Certainly to get people back in plant we will have to be in products we have not been in before."

There is no allegation that any of Adams's remarks during this meeting violated the Act. Moreover, they show that, even before the representation election, Respondent had put its employees on notice of ongoing concerns about excess inventory, excess production magnified by loss of the Canadian market, failure to achieve a 20-percent return on average capital during past years, high labor costs—$23 per hour—at Albert Lea, and underutilization of the Jerome facility. In other words, Adams informed Albert Lea employees of concerns which, as discussed in preceding subsections, had existed for approximately 2 years.

His remarks also informed employees that layoffs had been one corrective course which Respondent had been pursuing and, most significantly with respect to succeeding layoffs, that Respondent planned "bringing hourly down to 0," but not "for any period of time." As to that subject, Adams reviewed eligibility to receive pay for unused vacation time and explained that new employees would not be hired before recall notice was given to laid-off employees. Those statements are consistent with the messages which Respondent asserted that its officials had been trying to convey to Leah Adams and Vokoun, as well as to Dawson and Conway—that laid off employees could receive pay for unused vacation time, but only after year's end, and that Respondent intended to recall laid off employees if its situation improved.

The most significant aspect of Adams's remarks pertain to the pressure-to-acquiesce-to-bargaining-demands theory advanced in support of the discrimination allegations. Adams announced that Respondent intended "to discuss" any relocation of production to Jerome and to bargain about time of payment for unused vacation. It is uncontested that, in discussing the upcoming representation election, he told the assembled employees that Respondent "need[s] to negotiate with the employees—from our standpoint—pick some one for us to negotiate with. Pick someone clearly endorsed by all employees," adding, "What is important to you and what concession to make," and, "How quickly you proceed is very important," so, "Get thoughts ideas and goals together and get to us so that we can start talking. Until then nothing can happen."

Those are hardly the remarks of an employer unwilling to observe the principles of lawful collective bargaining. Nor are they ones which evidence a disposition to engage in unlawful bargaining by trying "to pressure employees to accede to" unlawful bargaining demands. After all, forcing employee acquiescence to a preplanned agenda of employment conditions is hardly advanced by affirmatively encouraging those employees to select a bargaining agent.

The General Counsel's discrimination allegations are not advanced by Respondent's use of supervisors and managers, augmented by temporary labor supplied by Cedar Valley Services, during the period when regular employees had been laid off after April 11. As to the supervisors and managers, it is not truly disputed that supervisors had historically filled in for production employees at Albert Lea. However, there is a dispute about the extent to which they had done so. And it appears undisputed that managers had done so, if at all, only rarely prior to 1994.

As to Cedar Valley Services, before 1994 that firm had been called Career Industries. Respondent began using its "clients" during 1989. But not on a regular basis. Its clients had worked at Respondent's Albert Lea facility for 341 total working hours during October 1990 and for 52.5 total working hours during November 1990.[11] So far as the evidence discloses, no clients were placed again with Respondent until September 1991, when they worked there a total of 63 hours, and during October 1991, when they worked there for 391.25 total working hours.[12]

[11] Also supplied was a crew supervisor who worked a lesser number of hours at Respondent's facility, while clients were there.

[12] Again, with a crew supervisor working a lesser number of hours.

There is no evidence that any Cedar Valley Services clients worked again at Respondent until January of 1994.

From that month through September 1994, its clients worked for Respondent a total of:

242 hours during January
560 hours during June
116 hours during February
587 hours during July
178 hours during March
88 hours during August
171 hours during April
357 hours during September
291 hours during May

So far as the record shows, Cedar Valley Services—and, before it, Career Industries—clients had never worked so many total hours at Respondent as during June and July 1994.

Respondent never truly contested the facts that, following the April 11 group layoff and increasing with each succeeding group layoffs, its supervisors and managers and Cedar Valley Services clients had performed an increasing amount of the work which laid-off employees ordinarily performed. Still, that does not actually advance the General Counsel's discrimination theory. Nor does it show independently that Respondent violated Section 8(a)(3) and (1) of the Act by assigning unit work to temporary workers and to supervisors and managers after April 11.

In the first place, use of supervisors and of outside labor, to fill-in for laid-off employees, was not an idea which arose suddenly when the Respondent learned that the Union was engaging in an organizing campaign at the Albert Lea facility. As set forth in subsection E, one of Bennecon's medium-term recommendations had been use of "outside assistance when necessary." During October 1993, Adams had mentioned "contracting out some of the work" to Attorney Ohly, as described in subsection I. The comparative capability profile of January 21, 1994, described in subsection H, contemplated reducing the Albert Lea personnel level to two six-person crews. And Adams contemplated, at that time, that those crews would be staffed by "management," augmented by temporary help. Consequently, just as the idea of layoffs did not arise only after the Union's organizing campaign came to Respondent's attention, during March 1994, the idea of performing reduced production after layoffs with primarily "management" and temporary help had arisen also before March 1994.

Having supervisors "fill-in," when needed, was not a novel concept, nor one which arose when the Union began organizing Albert Lea's production and maintenance employees. It is undisputed that they regularly had done so. Indeed, as set forth in subsection H, that activity had led Bower to contest Hobb's assertion, during late 1992, that there was a "massively disproportionate" number of supervisors at Albert Lea. That is, Bower asserted that those supervisors "did a lot of production work" there. And, of course, production work at Jerome was being performed primarily by supervisors.

Similarly, as set forth above, Cedar Valley Services clients had performed 242 total hours during January 1994 and 116 total hours during February 1994 of work at the Albert Lea facility. Of course, those were both months which occurred before Respondent had received Kodluboy's letter of March 10, 1994. Moreover, clients from Cedar Valley Services, and before it from Career Industries, had worked there in past years, though not so regularly as during 1994.

To be sure, the amount of work performed by "management" and Cedar Valley Services clients increased as each group layoff occurred. But, as described above, that had been contemplated by Respondent, particularly by Adams in his comparative capability profile. There is no direct evidence that either increase had been motivated by some type of long-range intention to badger the Union, should it ever become the representative of Albert Lea's employees, into accepting Respondent's as yet undeveloped, so far as the record discloses, bargaining proposals. Rather, the increases in production work by "management" and clients were integral components of Respondent's long-intended overall plan to reduce production at Albert Lea, and to continue production there on only a limited scale following the layoffs effected to reduce production.

As concluded above, a preponderance of the credible evidence does not establish that the first three group layoffs, at least, had been unlawfully motivated. So, neither can the related actions taken to implement those group layoffs—use of "management" and Cedar Valley Services clients to conduct limited production—be concluded to have been unlawfully motivated. All are part of the warp and woof of an overall plan, long contemplated, to allow excess inventory to be absorbed by limiting ongoing production at Albert Lea.

In that regard, it is significant that there is no evidence that the total amount of hours worked by "management" and by the clients equaled, or anywhere approached, the total number of hours after April 11 that would have been worked by employees who were laid off, had the latter continued working there. Concomitantly, there is no evidence supporting a conclusion that limited production after April 11 had equaled, or anywhere approached, a level that would have been achieved by the laid-off employees, had they continued working after their layoffs. In the foregoing circumstances, I conclude that a preponderance of the credible evidence fails to support the allegations that Respondent had been unlawfully motivated in deciding to lay off groups of employees on April 11, 25, and May 2, by assigning supervisors and managers to perform whatever excess production work thereafter needed to be performed, and by retaining clients from Cedar Valley Services to also perform that limited production work. Therefore, I shall dismiss the allegation that Respondent violated Section 8(a)(3) and (1) of the Act by having taken those actions.

As pointed out above, the final group layoff is discussed in the succeeding subsection. In this one, however, another allegation should be covered. Though its affects did not occur until summer, those affects rest upon an event which chronologically occurs before the representation election, during April.

It is alleged, as stated in subsection A, that after June 15, 1994, without prior notice to the Union, Respondent shut down the Albert Lea facility, pursuant to a contract with its electricity supplier, during "peak alerts." A Stipulation entered during the September hearing shows that Respondent executed Interruptible Electric Service agreements with Interstate Power Company (Interstate), one agreement for each of the meters at the Albert Lea facility. In return for agreement to allow discontinuance of its power during peak energy usage periods, Respondent receives reduced power rates.

Those agreements were entered into on April 21, 1994, before the Union became the Albert Lea employees' representative. As noted in subsection E, Bennecon identified "electricity

usage" as one of that facility's "three cost areas." During his March 23 meeting with the employee committee's negotiators, discussed in subsection J, Adams identified "[w]orking with the electrical company to reduce the utility costs," as one area to which Respondent would be looking to reduce costs. There is no allegation that Respondent had acted for any unlawful motive, at least under the Act, when it signed the agreements with Interstate.

Interstate makes its own determination, without regard to Respondent's particular electricity usage, as to when Respondent's power will be interrupted. That determination is based upon total power usage in Interstate's customer service area. Accordingly, Respondent has no discretion which it can exercise as to when a discontinuance of power will be declared, nor does Respondent's power usage independently influence Interstate's decisions.

Respondent does not have much prior notice of when its power will be discontinued by Interstate, during a "peak alert." Under the agreements, Interstate "will endeavor to give" Respondent two hours notice that the latter's power will be interrupted. Yet, even two hours notice is hardly adequate time to notify a bargaining agent that such notice has been received and to undertake bargaining about the effects of a power interruption.

During the summer of 1994 there were approximately three occasions when Respondent's power was interrupted, for a "peak alert," and, without adequate power, it was obliged to shut down. On those days, employees were sent home and were not paid for time lost, save to the extent that one or more of them chose to apply sick or vacation time to those days. Respondent does not contend that it affirmatively offered to bargain about the affects of those summer 1994 "peak alert" shutdowns. On the other hand, the Union does not deny that it knew such shutdowns were occurring, particularly after the first one had occurred. Nor has it been shown that the Union asked to bargain about the affects of those shutdowns during the summer of 1994.

In contrast, there obviously was discussion of "peak alert" shutdowns during negotiations which began during June 1994. For, the parties included "electrical or other utility interruptions (including those under interruptible electric power agreements)" during their negotiations about the "*Seniority, Job Bids, Layoff & Recall"* contractual provisions. As a result, it cannot be said that Respondent had been unwilling to bargain about the subject of "peak alert" shutdowns.

In the foregoing circumstances, I conclude that Respondent did not violate Section 8(a)(5) and (1) of the Act when it did not give notice to the Union before "peak alert" shutdowns during the summer of 1994. Before the Union became the representative of Albert Lea's production and maintenance employees, and pursuant to a relatively longstanding desire to reduce costs at that facility, Respondent had entered into agreements to abide by power interruptions in return for reduced electricity rates. Interstate, not Respondent, determines when those interruptions, which necessitate shutdowns of production at the Albert Lea facility, will occur. Nothing Respondent does at that facility can affect Interstate's decision as to when power to that facility will be interrupted due to a "peak alert."

Notification of interruption of power is relatively short. Respondent has not shown any unwillingness to bargain about the affects of those shutdowns. There is no evidence that the Union has requested it to bargain about "peak alert" shutdowns and their affects during the summer of 1994. Therefore, I shall dismiss this allegation.

L. Efforts to Commence Negotiations and Other May Events

The election results were tallied on April 29. Boxing employee Charles Joel testified that, on some date after the April 25 second group layoff, Production Superintendent VanKampen had come into the lunchroom and had "said that the sooner we got the contract the sooner that the people that were laid off would be back to work." According to Joel, "There was other employees there, but I'm not sure who they were." VanKampen denied ever having threatened any employee by suggesting that employee recall from layoff was contingent upon reaching agreement on terms for a contract.

Joel also testified that, on a day after the election but before negotiations began, he had been in the lunchroom where he encountered Production Manager Johnson and initiated a conversation with Johnson by asking, "How is the company going to screw us now?" According to Joel, Johnson responded, "We'd better take what Mr. Adams had offered us or else." Joel testified that Johnson also said, "The longer it took to get a contract, the less we would get." The complaint alleges that Respondent violated Section 8(a)(1) of the Act by Johnson's threat that employees better accept what Respondent had offered in negotiations because the longer negotiations took, the less employees would get.

Johnson acknowledged that during the March 23 meeting with the employee committee's negotiators, he had responded to a question, about the amount of reduction Respondent was seeking, by saying, "The soon we get things settled will determine the amount of reduction that we must take."[13] However, Johnson testified that after the election he had avoided speaking to employees about the negotiating process: "I felt that any information that the employees got with regard to negotiations should come from the negotiating team." In consequence, he testified, "At this point I had no recollection of ever discussing [negotiation sessions] outside of the meetings."

Johnson denied specifically ever having told Joel that employees had better take what Adams offered or else. He denied specifically ever having told Joel that the longer it took to get a contract the less the employees would get. He did describe a brief lunchroom exchange with Joel, on April 29, after the ballots had been counted, which began when Joel asked, "Does Mr. Adams still think he is going to cut our wages?" Johnson testified that he had replied merely, "No, you guys are [going] through negotiations."

Significantly, Joel testified that when Johnson purportedly had made the above-described statements, which Joel attributed to Johnson, "I think Frank Nellis was there and Tim Johnson." Tim Johnson never appeared as a witness, though there was neither evidence nor representation that he was not available to testify. Nellis testified at some length for the General Counsel. But he never corroborated Joel's testimony about Production Manager Johnson's supposed lunchroom statements. Indeed, Nellis testified that Production Manager Johnson had told maintenance man Lair that the employees needed a union.

[13] By that remark he had meant, Johnson testified, "[T]he sooner we knew [what] it cost us to make the twine the sooner we could go out and determine what business we could get at those costs, because, It was the company's position that we needed to know what it cost to make twine."

In subsection J, I was unwilling to rely on Joel's testimony about supposed remarks by Adams at some sort of purported March meeting between Adams and employees. In fact, there is no evidence that such a meeting, other than the one on March 23 with the employee committee's negotiators, had occurred during March. As was the fact regarding his testimony about that purported meeting, no one corroborated Joel's descriptions of VanKampen's and Johnson's above-described asserted statements.

As must be obvious from his own descriptions of his remarks to VanKampen and Johnson, when testifying Joel did appear to have a chip on his shoulder regarding Respondent. He was dissatisfied that he had not been recalled sooner from layoff. When recalled, he had been assigned to a job different from the one that he had performed before his layoff. In sum, it appeared that Joel was biased against Respondent to the point where his testimony cannot be relied on as credible. In light of the foregoing considerations, I do not credit Joel and conclude that VanKampen and Johnson did not make the statements attributed to them by Joel. Accordingly, I shall dismiss the allegation that Johnson's purported statement violated Section 8(a)(1) of the Act.

Turning to the effort to start bargaining between Respondent and the Union, Kodluboy testified that, after he had sent his notice of organizing campaign letter to Respondent on March 10, the campaign had been assigned to Staff Organizer Keith Grover. Indeed, by letter dated April 11, 1994, Grover had notified Adams of the identities of additional employees who had joined the Union's organizing campaign. Following the representation election on April 29, it is uncontroverted that Adams telephoned Grover to set up a meeting. However, Grover said that Kodluboy would be handling negotiations and, as the latter was not in, Adams asked that Kodluboy contact Respondent.

In fact, Kodluboy did so. But not by telephone. By letter to Adams dated April 29, 1994, Kodluboy requested commencement of negotiations "as soon as possible" for "a new collective-bargaining agreement" and, also, requested that Respondent supply certain information to facilitate negotiations by the Union. Apparently while that letter was in transit, Adams again called the Union. Once more he was told that Kodluboy was out of the office and was told, by the person with whom Adams spoke, "I will get him in touch with you." This testimony shows that Adams did want to begin negotiating.

Adams and Kodluboy eventually made contact by telephone. Two aspects of that call are important to the allegations in this proceeding. First, Adams testified that, "I proposed a get acquainted meeting with the purpose of just being able to have an informal chat about how we both saw negotiations proceeding, and hopefully to even get as far as to get a schedule for early negotiating sessions." According to Adams, a luncheon meeting was agreed upon to be held, at Kodluboy's suggestion, in Bloomington, Minnesota, where Adams resides, rather than in Albert Lea. Adams testified that Kodluboy "had said he had a meeting in the morning and when he got out he would give me a call and we could meet at the restaurant."

Second, Adams testified that "when I finally did get a hold of Mike Kodluboy[,] whenever the first time we talked[,] we did discuss the layoffs." During the ensuing discussion of that subject, testified Adams, Kodluboy said no more than that, "[w]e're concerned, we want to get our people back to work as soon as possible," to which Adam replied that they could discuss the subject further during their luncheon meeting. Although Kodluboy denied generally that Adams had mentioned anything about layoffs during this conversation, he did not deny with particularity that Adams had made the above-quoted statements during their conversation. Nor did Kodluboy deny having made the limited response which Adams described.

By letter to Kodluboy, dated May 3, 1994, Adams transmitted the information requested in Kodluboy's April 29 letter. Kodluboy agreed that the information had been received by the Union and there is no allegation that Respondent violated the Act in connection with that particular information request and production. However, Kodluboy testified that it had been after receiving that letter, "somewhere in the second week of May," that he and Adams had participated in the telephone conversation during which "he said he'd like to do it as quickly as possible. So, we had tentatively agreed on a date to meet," which was May 13, for lunch. But there is a problem with Kodluboy's sequence of events.

The final paragraph of Adams's May 3 letter recites, "I look forward to meeting you informally for lunch on 13 May. And it is my hope that by that time we will have scheduled our first formal negotiating session." Obviously, the telephone arrangement for the luncheon meeting had to have taken place before Adams had sent the letter, not after Kodluboy received it, as the latter claimed. That disparity might have been inconsequential had Kodluboy shown up for the luncheon and had he not advanced a rolling series of different explanations for not having done so. In fact, Kodluboy did not appear in Bloomington on May 13.

Initially, he testified that the luncheon arrangements had been only tentative, "because I have some obligations on that date. . . . Union business elsewhere and I didn't know how long it was going to take." That explanation tended to be undermined by production of Kodluboy's calendar for May, showing that for Friday, May 13, Respondent was the top entry. Kodluboy never claimed that he had not written down whatever other "Union business" he had on that date. Nor did he identify whatever other "business" he purportedly had that day.

Below the entry for Respondent on May 13 was written "MRI." A similar MRI entry appears on the calendar's preceding day. Kodluboy ultimately conceded "on the date of the 12th I was down in Mason City, Iowa, with Minnesota Rubber. I had business down there and it overlapped into the 13th." But, he never claimed that, when speaking with Adams, he had anticipated that the Minnesota Rubber business would take more than a day. To the contrary, the MRI entry for May 13, after the entry that day for Respondent, tends to indicate that, when speaking with Adams, Kodluboy had not anticipated that the Minnesota Rubber business would extend into May 13. In short, so far as the calendar entries disclose, as of his initial telephone conversation with Adams, Kodluboy had no potentially conflicting "obligation" on May 13 which would naturally have led him to make only tentative arrangements with Adams for lunch on that day.

That might not have been a significant situation, had Kodluboy given notice of his changed plan to Adams, after arranging to remain in Mason City for another day. But he did not do so. He testified that he had called Respondent's Albert Lea facility that day to give notice that he would not be attending the luncheon. Yet, he was not able to identify the person with whom he assertedly had spoken: "I believe it was the secretary. I'm not sure what their position was there." In any event, mak-

ing a call to the Albert Lea facility would have been inexplicable.

Kodluboy did not deny that the luncheon arrangements had been made for Bloomington and, further, did not deny that he had known that Adams would be waiting there on May 13, rather than in Albert Lea. Moreover, Kodluboy did know the home number for Adams; it is written on Kodluboy's calendar for May 13. Still, he never explained why he would have chosen to call the Albert Lea plant, to give notice that he did not intend to attend the luncheon, rather than to call Adams at the latter's Bloomington home. Further, as will be discussed below, Kodluboy advanced a different explanation to Adams for not having called when the two men spoke on May 14. Before moving to a discussion of that conversation, another point should be covered.

In his May 3 letter to Kodluboy, Adams also stated:

> In addition to the relevant contract issues, you are probably aware that we announced to our employees some time ago that we would be resuming a more practical level of production at our Jerome, Idaho facility for both operational and marketing reasons that do not relate to labor issues. Consequently we are also prepared to discuss the impact of this decision on our facility at Albert Lea.
>
> Management is also considering other actions directly related to labor costs, including the transfer of additional work. These have generally been discussed with the work force and will be important issues for our contract talks.

Adams testified that he had provided this information as "notification to the [U]nion of our plans for the operating levels that we already planned to establish for Jerome." He explained that, as to production capacity there beyond the 50-percent level, "the more competitive our costs at Albert Lea the less attractive it is to go through the hassle of ramping up further at Jerome." Of course, those explanations are consistent with prior decisions regarding Jerome production, as discussed in preceding subsections.

Asked what knowledge he had acquired about the remarks by Adams during the late April meetings with employees, described in the preceding subsection, Kodluboy testified, "I'm only aware of [them] because of what came out here. I wasn't aware of it at the time." Asked if he had been kept abreast of events at Respondent by Grover, who had been in charge of the organizing campaign, Kodluboy responded, "In a general overview, yes." Asked if he had been told of the Respondent's late April employee meetings by Grover, Kodluboy answered, "Not that I'm aware of. I received a general status report that the [organizing] committee was growing and stuff like that," but "the day to day details rested with" Grover. Kodluboy claimed that he "never heard" from Grover that Respondent was looking for economic concessions, nor that Respondent thought that it needed to change its economic position in Albert Lea. That testimony was not delivered convincingly and, all things considered, I do not believe it.

Adams testified that, during the afternoon of May 13, he had called both the Union's office in St. Paul, Minnesota, out of which Kodluboy worked, and the Albert Lea plant, seeking to ascertain whether anyone knew of Kodluboy's whereabouts and why he had not called about, nor shown up for, the luncheon. During his second call to the Union that afternoon, Adams was told that Kodluboy was not there and no luncheon was on his schedule for that day, at least to the knowledge of the person with whom Adams spoke. The secretary at Respondent's plant said that no messages from Kodluboy had been received there.

Both Adams and Kodluboy testified that the latter did telephone the former, at his home, on Saturday, May 14. Adams testified that Kodluboy "apologized for not showing up for lunch and said that one of our employees had had a heart attack the day before and passed away and that had been the cause of his not being able to make our appointment." As the conversation progressed, Adams mentioned getting together. He testified that Kodluboy replied that he would be in the Albert Lea area on Friday, May 20, and "why don't I give you a call and maybe we can have lunch on Friday?" On May 20, however, Adams received no telephone call from Kodluboy.

Kodluboy testified, "I can't remember" having arranged a meeting with Adams on May 20. Asked if he had told Adams on May 14 that he had been unable to attend the preceding day's luncheon because someone had suffered a heart attack, Kodluboy equivocated and became quite vague in his answers:

> You know, there was a person that did pass away. I can't remember exactly right now. If you're talking about Galen Green that might be true. But I can't remember in detail right now.
>
> Q. But isn't it true that you told Mr. Adams that the reason you hadn't been able to make the lunch with him was because that this individual had suffered a heart attack?
>
> A. I want to answer the question that you asked only and I'm really trying to seriously think about this. That I believe Galen Green is the individual that had a heart attack. I can't remember the time frame at the time. I don't see why I wouldn't tell him exactly what happened, that I was tied up.
>
> Q. Do you recall exactly what it was that you told Mr. Adams in your telephone conversation on May 14th about why you hadn't made the meeting?
>
> A. I believe that I would have told him exactly what I couldn't make it, but I can recall something about Galen—I think it was Galen Green that had the heart attack.
>
> Q. Do you recall discussing that with Mr. Adams during that telephone conversation?
>
> A. I might have done that.

Not having heard from Kodluboy on May 20, by letter to him bearing that same date, Adams stated:

> I regret that you were unable to make it to our scheduled meeting last Friday. Per our conversation of Saturday, 14 May 1994, I was hoping to hear from you today if your schedule permitted.
>
> As we have a number of important issues affecting our workers to discuss, we believe that it is important to establish a schedule for our meetings in the near future. Please contact me to set up an initial meeting at your earliest convenience.

Kodluboy acknowledged having received this letter. But, he did not claim that he had answered it.

Asked, in effect, about his reaction to the statements in that letter's first paragraph, Kodluboy testified, "I don't believe that was a scheduled luncheon date. He might have said he wanted to hear from me, but that was not a scheduled meeting." Then he answered, "I can't remember" when asked if he had told Adams that he would be in Albert Lea on May 20. He gave

that same answer when asked if he had any recollection of discussing May 20 with Adams. Asked, finally, if he had any idea why Adams would have thought that he would be hearing from Kodluboy on May 20, the latter responded, "There may well have been a good reason. I just can't remember."

Aside from providing specific illustrations of the general unreliability of Kodluboy's testimony, the foregoing description is also significant because it begins to display two courses which Kodluboy seemed to follow in connection with his negotiations with Respondent. First, he tried to avoid bargaining about the subject of economic concessions. Obviously, one means for doing so is to avoid meeting, altogether. The above-described events at least appear to show that Kodluboy was trying to avoid meeting with Respondent.

Second, it appeared, as time passed, that Kodluboy was playing a "waiting game," by seizing on actions by Respondent, claiming that they were unfair labor practices, and then asserting that their existence tainted any bargaining which occurred subsequently. One element of that approach appeared to be Kodluboy's occasional pleas that he had been unaware of the situation at Respondent's Albert Lea facility, such as with regard to the remarks by Adams during the all employee meetings at April's end.

Kodluboy is an experienced negotiator. He appeared to be a quite meticulous individual—so meticulous was his preparation to deal with Respondent that, as set forth in subsection I, he had made the effort to check with East Coast sources regarding Adams's reputation. The Union's bargaining relationship with Respondent had been a newly created one. Given these facts, it seems not credible that Kodluboy would not have made the effort to inform himself about the situation of employees at Albert Lea and of Respondent's announced intentions concerning their employment terms.

Obviously, he had sources for doing so. Almost all of Respondent's employees had attended the late April meetings. Even if Kodluboy truly had lost contact with Respondent during the organizing campaign, Staff Organizer Grover had been overseeing it. So far as the record discloses, there would have been no reason for Grover to refrain from informing Kodluboy about events at Respondent which would, or might, affect negotiations with it.

True, as set forth above, Kodluboy claimed that he had been provided by Grover with only "general status" reports about the situation at Respondent. However, there was neither evidence nor representation that Grover had not been available to testify in the instant proceeding. Yet, Grover did not appear and corroborate Kodluboy's testimony that, in effect, he had not fully informed Kodluboy of the situation and events at Respondent.

If nothing else, some of the above-quoted remarks in Adams's May 3 letter, as well as in his May 20 letter, should have put Kodluboy on notice of a need to better inform himself as to events at the Albert Lea facility. I simply do not credit his testimony that he had been unaware, during May, of remarks by Adams to all employees at the end of April. In any event, as described in subsection M, infra, Kodluboy's own description of what Adams had said, during their June 9 informal meeting, reveals that he had been informed of Respondent's concerns and proposed corrective actions before negotiations actually commenced.

Indeed, it was not until June 9—almost 6 weeks after the election and slightly more than a month after certification of the Union had issued—that Adams finally was able to participate in a meeting with Kodluboy. No doubt that frustrated Respondent's officials, since Adams did genuinely appear to want negotiations to begin. That frustration was reflected in remarks which I conclude were made by Shift Supervisor Wade Carlson and, during another conversation, by Shift Superintendent VanKampen.

The General Counsel alleges Carlson unlawfully threatened that Respondent would move part of its operations to Idaho if the Union did not start negotiations. In that regard, Boxing Tech and Unit Chair Nellis testified that, in the lunchroom on May 23, Carlson had initiated a conversation by saying, "[T]hat Bill Adams had said that if we didn't get moving on these negotiations that he was going to take [extrusion] lines 5 and 6 and move them to Jerome, Idaho."

Carlson denied having told Nellis that Adams had said that if the Union did not start negotiating he would move lines 5 and 6 to Idaho. Still, he admitted that there had been a conversation in the lunchroom, before negotiations began, when "I asked Mr. Nellis how he was doing in getting people together to negotiate and I remember saying that I'd heard that Mr. Adams had felt that they were or I [was] told that Mr. Adams had felt that they were dragging their feet or kind of stalling, . . . and I also said to him that I had heard rumors of equipment maybe being moved." Furthermore, while he testified that he had said nothing more about moving to Jerome than what Adams had said at the April 25 meeting, Carlson testified that, on the same day as he had spoken with Nellis, VanKampen had said that Adams felt that the Union was dragging its feet.

Nellis testified that, present in the lunchroom during Carlson's remarks on May 23, had been Maintenance Man Mark Lair and Roblon Technician Stanley Wirtjes. Both of these employees, as well as boxing employee Joel, testified to overhearing Carlson's remarks. Lair testified, "Wade said something to the effect that we were dragging our feet, the Union, and that if we didn't get something settled that he thought that they were going to move lines 5 and 6 to Jerome." He further testified that he did not recall Carlson having said that "Adams had said" that lines 5 and 6 were going to be moved, but agreed that Carlson had said only that "he thought" that would occur.

Wirtjes recalled only that "Wade Carlson had said if we don't do something immediately they were going to move line 6 and I believe line 5 to Idaho." Like Lair, Wirtjes agreed that Carlson did not say that, Adams had said that the lines would be moved. Similarly, Joel testified that Carlson had "said that if we didn't—didn't get the contract started pretty soon they were to start moving stuff out to Idaho."

The second conversation occurred at the Norwest Bank, as VanKampen's path crossed that of then-laid-off employee Lance Goodman, while the two men were doing their banking. During their relatively brief conversation, testified Goodman, VanKampen had said that Adams "had been trying to get ahold of Mike" to start negotiations, but that Kodluboy was refusing to meet. Goodman testified that he disputed that assertion, saying that he had spoken with Kodluboy who had reported that there had been a meeting.[14]

According to Goodman, VanKampen replied that there had been no such meeting, that he had been "told that they wouldn't meet," and that Respondent had had its proposal ready for two

[14] Goodman never explained why he had told that to VanKampen, given the fact that Goodman testified that this conversation had occurred before negotiations had begun.

months and "wanted to get going on it." Goodman testified that the conversation ended with VanKampen saying, "Bill's firing up Idaho so you better tell them to get going, something like that." That last remark is alleged by the General Counsel to have been an unlawful threat to move "operations to Idaho if the Union did not speedily agree to a contract."

Of course, that is not actually what Goodman testified that VanKampen had said. That is, he did not claim that VanKampen had said anything about "agree to a contract," but only "to get going" on meeting to negotiate. That had been the same message that Carlson had communicated to Nellis in the lunchroom.

VanKampen denied ever having threatened any employee that Respondent was planning to move operations to Idaho if the Union did not speedily agree to a contract. He testified that, during the conversation with Goodman, he "basically tried to summarize what was said at the March 23rd meeting." Of course, it had been during that meeting, as described above, that Adams had said, "If we can not get a quick agreement with the Albert Lea employees, I will have no choice but to transfer jobs and equipment to Jerome where the costs of production are far less then [sic] here."

Beyond that, VanKampen never explained why he had seen fit to explain to Goodman what had been said during the March 23 meeting between Respondent and the employee committee. VanKampen did not dispute that the Norwest Bank conversation had occurred after the election. By then, Adams had conducted the April meetings at which was imparted to all employees similar information as Adams had imparted on March 23 to the committee.

I conclude that Carlson and VanKampen each did threaten that Respondent would relocate operations from Albert Lea to Jerome. Though Nellis was not generally a credible witness, his account of Carlson's remarks to that effect is essentially corroborated by the testimony of Lair and Wirtjes. It finds additional corroboration in the similar remarks to Goodman by VanKampen, on a separate occasion. Neither supervisor credibly denied having mentioned, on those occasions, relocating production to Jerome. To the contrary, their entire accounts tend to show that each did warn that production might be relocated to Jerome.

Whether they actually said that they were quoting Adams, or were merely making such warnings independently of whatever they had been told by Adams, is immaterial. Carlson and VanKampen were agents of Respondent at the times of their statements. The employees who heard them were entitled to believe that, as supervisors and agents of Respondent, Carlson and VanKampen were speaking for it. A more interesting question, however, is presented by their statements about the event which would lead Respondent to relocate production to Jerome.

The accounts of all of the employees—Nellis, Lair, Wirtjes, and Goodman—show that the warnings of production relocation had been pegged to expressions of frustration about the Union's seeming refusal to meet for negotiations and to continuation of that seeming refusal. For example, Goodman testified that VanKampen had claimed that Kodluboy was refusing to meet and, then, warned that "you better tell [the Union] to get going," because Adams was "firing up Idaho."

Having been selected as exclusive representative of Albert Lea production and maintenance employees under Section 9(a) of the Act, the Union was no less obliged than Respondent to promptly meet and attempt to negotiate terms for a collective-bargaining contract. Accordingly, rather than naturally discouraging employees' union support and activities, Carlson's and VanKampen's warning had a natural tendency to promote that statutory objective of promptly meeting to negotiate—to persuade employees to influence their bargaining agent's designated representative, Kodluboy, to observe the Union's statutorily mandated obligation.

Still, to achieve compliance with the obligations which it imposes, the Act does not authorize open-ended action by adversely affected employers and labor organizations. If Respondent believed that the Union was unlawfully refusing to meet and bargain, then it could have filed an unfair labor practice charge, alleging violation of Section 8(b)(3) of the Act. So far as the evidence discloses, it did not do so. Alternatively, it could have given notice to the Union of proposed changes in specific employment terms and, then, implemented them if the Union did not meet to bargain about those changes within a reasonable period. See, e.g., *M & M Bldg. & Electrical Contractors*, 262 NLRB 1472 (1982), affd. mem. sub nom. *Carpenters Local 266 v. NLRB*, 707 F.2d 516 (9th Cir. 1983). There is no evidence that Respondent pursued that course, either.

Instead, Carlson and VanKampen directly approached employees and, in effect, sought their intervention to persuade the Union to begin meeting. Standing alone, that might not have been improper. Nevertheless, there is inherent danger to the statutory process of representation whenever an employer involves itself in relations between a bargaining agent and employees whom it represents. That inherent danger, of course, is that divisions can be created and fostered between employees and their representative.

Bargaining agents under the Act are allowed to pursue bargaining courses, and utilize tactics in doing so, with which employers might not agree, but which ultimately may benefit represented employees. To too readily allow employers to take their protests about such bargaining courses and tactics directly to represented employees, is to risk permitting employers to sow division between employees and bargaining agents, with consequent injury to the bargaining process.

To permit employers to take the added step of threatening or warning about adverse employment consequences, in conjunction with protesting to employees about their bargaining agent's action or inaction, is to permit too great an infringement of the statutorily contemplated bargaining process and, derivately, of employee rights to representation protected by the Act.

Here, during May, the Union did appear to be evading its statutory obligation to promptly meet with Respondent for negotiations. Carlson's and VanKampen's above-quoted remarks did tend to promote observation by the Union of that statutory obligation. However, on balance, the accompanying threats of adverse employment consequences too greatly burden the bargaining process and employees' statutory rights for the Act to allow employers to take that added step of making such threats should the employees' bargaining agent continue failing to observe its statutory obligation. Such conduct would permit employers to use the employment relationship as a cudgel to interfere with the relationship between bargaining agents and employees whom they represent.

To be sure, Respondent's employees knew, or should have known by May—from March and April meetings with Adams—that there was a relationship between negotiating concessions at Albert Lea and relocation of some production to Jerome. But, the extent to which the former led or did not lead

to the latter, as Adams had explained to the employees, was to be determined by the substance of negotiations. The existence of such a causal relationship did not privilege supervisors to use it as a vehicle for statements which naturally posed a risk of disrupting the relationship between employees and the bargaining agent which they had selected. If Respondent wanted to persuade the Union to observe its statutory obligation, then Respondent should have pursued one of the above-mentioned alternative means allowed by the Act for doing so. By threatening employees, its supervisors went too far and violated Section 8(a)(1) of the Act.

During May two other events occurred which the General Counsel alleges had been unlawfully motivated. First, by notice dated May 9, Respondent announced the fourth group of layoffs, "effective 6:00 a.m. on Monday, May 23, 1994." In fact, those layoffs did occur on that date. As a result, production at Albert Lea was being conducted thereafter by technicians, maintenance employees, supervisors, managers, and Cedar Valley Service clients.

Of course, that is essentially the result contemplated by remarks of Adams to Ohly in October 1993, as described in subsection I, by the comparative capability profile, described in subsection H, and by Adams's statements to assembled employees during late April, covered in subsection K, as part of Respondent's planned corrective actions to absorb excessive inventory: "Bringing the hourly down to 0[.]" Further, there is nothing to differentiate the motivation for this final group layoff from the not unlawfully motivated three group layoffs which had preceded it. So far as the record shows, it had been no more than an additional incremental step to promote Respondent's overall objective of allowing excess inventory to be absorbed by reducing production.

True, by May 9 the Union had been certified as the representative of Albert Lea production and maintenance employees. And, as discussed above, Respondent eventually did become frustrated with Kodluboy's perceived unwillingness to meet for negotiations. But that frustration did not exist on May 9. On that date, Adams was planning to meet in 4 days with Kodluboy. As of May 9, delay in starting negotiations was not a fact which Adams could have anticipated, so far as the evidence discloses.

Even though the Union had become the employees' representative by May 9, as discussed in preceding subsections, Respondent, especially Adams, had encouraged the employees to select a bargaining representative. Adams still appeared confident, based on his past experience, that he would readily work out concessions with the Union, given the situation at the Albert Lea facility. There is no evidence that, as of May 9—nor, even, as of May 23—Adams had any concern about encountering difficulty in achieving Respondent's bargaining objectives. In consequence, as with the prior group layoffs, there is no evidence supporting a conclusion that the last group layoff, on May 23, had been some form of lockout, motivated by intention to compel the Union to acquiesce in whatever bargaining demands Respondent might make.

Nor can such a motive be inferred from the fact that Respondent did not give the Union prior notice of the group layoff announcement on May 9, before it was announced to the employees and implemented. That subject is analyzed in section II, infra. Here, it need only be pointed out that even unilateral changes which violate Section 8(a)(5) of the Act do not establish, standing alone, the animus and unlawful motivation elements required to find a violation of Section 8(a)(3) of the Act. Therefore, I shall dismiss the allegations that the group layoffs were unlawfully motivated.

The second May event pertains to a schedule change at Albert Lea. As pointed out in subsection C, prior to then, the Albert Lea facility operated 24 hours a day, 7 days a week. There were two night shifts and two day shifts. Effective May 23, Respondent began operating only two total shifts. One week, one shift worked for 4 days and the other shift for 3 days. The following week the latter shift would work 4 days and the first shift for 3 days. None of the still-working unit techs and maintenance employees lost any work hours as a result of the change. The change did allow Respondent to double up shift supervisors, thereby permitting each supervisor to perform an increased amount of production work. It also reduced the cost of full-time operation of the Albert Lea facility.

Although Respondent anticipated that the changed schedule would continue until at least mid-September, in mid-June, Respondent resumed production 24-hours a day, 7 days a week, apparently as a result of orders which led it to begin recalling laid-off employees during June, as discussed in subsection M, infra. Respondent admits that it never gave the Union prior notice of these scheduling changes. That aspect of the schedule changes is addressed in section II, infra. Here, it is Respondent's motivation for changing schedules which is being analyzed.

Respondent produced evidence that after Thanksgiving of 1992, to reduce inventory, it had changed the work schedule to a 5-day-a-week, 24-hour-a-day one. To accomplish that, the total of four crews were consolidated into three crews, doubling up some supervision and having those supervisors perform a greater amount of production work. Thus, VanKampen testified, "[T]hey would do the supervisory duties however long that would take, which generally speaking on normal days [was] two to three hours, and then they performed production work the rest of that time." After approximately 7 weeks, the normal production schedule was restored. In consequence, it cannot be said that the May–June 1994 schedule change had exactly been unprecedented.

More significantly, given the reduction in Albert Lea personnel, and Respondent's ongoing efforts to reduce production-related costs, such as energy usage, the schedule change was, in fact, a natural economy bred by reduced production from group layoffs. True, by May 23 Adams had begun experiencing a problem in meeting with Kodluboy. And on that same day, as described above, Shift Supervisor Carlson had voiced Respondent's frustration about that problem, in the process unlawfully threatening employees with relocation of production to Jerome. Still, there is no evidence from which it can be concluded that such frustration had motivated the decision to change the work schedule. Indeed, it is difficult to ascertain how such a change, of itself, could have been conceived as some sort of a prod to persuade the Union into meeting more promptly, much less to persuade the Union to accept proposals which Respondent planned to make.

In contrast, on May 23 the final group layoff had occurred. What production would then occur was being conducted by, in effect, skeleton crews. Economically, nothing was to be gained by continuing the four-crew, 24-hour-a-day schedule. Additional savings, such as reduced energy usage, could be achieved by not continuing to operate a round-the-clock schedule all week long. So, the change was an economically logical one.

As concluded above, and in preceding subsections, no unlawful motivation was involved in the decisions concerning earlier events which culminated in the work schedule change on May 23. That is, the credible evidence fails to show that the group layoffs had been motivated by considerations unlawful under the Act. Given the situation at the Albert Lea facility resulting from those events, it cannot be concluded that the schedule would not have been changed even had the Union not become the employees' bargaining agent and, further, even had Adams not begun being frustrated by Kodluboy's perceived unwillingness to meet for negotiations. Therefore, I conclude that a preponderance of the credible evidence fails to show that, by combining shifts and changing unit employees' days and hours of work from May 23 to mid-June 1994, Respondent violated Section 8(a)(3) and (1) of the Act.

M. Negotiations and Other Events During June 1994

Adams and Kodluboy finally did meet on June 9. It was planned as a get-acquainted session to lay a foundation for negotiations. Thus, Kodluboy testified that the meeting "was informal because we had not formulated our proposal yet. We were still electing and nominating, electing a negotiating committee, getting contract questionnaires out and waiting for them to come back. It was on June 9th." Still, that was not completely truthful testimony. With him to this meeting Kodluboy brought the employee members of the Union's negotiating committee: Nellis, Greg McKane, and Jeff Campbell. So, clearly the Union was no longer "electing and nominating, electing a negotiating committee" by the time of this meeting. Indeed, when appearing as a witness during February, Nellis testified that he had been elected to serve on the negotiating committee during, "Early May of 1994." Then, perhaps to correct the disparity between that testimony and Kodluboy's above-quoted testimony about the situation on June 9, when he appeared as a witness during the September hearing, Nellis testified that he had been on the negotiating committee, "Since the beginning in June of '94." In either event, the Union quite clearly was no longer "electing and nominating, electing a negotiating committee" when Kodluboy first met with Adams on June 9.

During that meeting, Adams testified that he had attempted "to at least hit the high points of the 23 March meeting and the all employee meeting on 25 April." Thus, he explained that Respondent had excessive inventory, compounded by loss of the Canadian market, with the result that "actions would have to be taken to correct that circumstance somehow;" that Respondent's "fully loaded" hourly labor rate—base wages plus benefits—at Albert Lea was in the $21 to $23 range which was out of line with community and industry rates, as well as with the fully loaded $13 hourly rate at the Jerome facility; and, that Respondent was "substantially below" the 20-percent annual return target expected by Bridon American and Bridon Group.

Nellis confirmed that Adams had said, "[T]hat it is $22.00 an hour in Albert Lea to run the plant, and he could run for $13.00 an hour in Jerome, and Jerome, Idaho was making $8.25 an hour and Exxon was making $8.25 an hour."[15] Nellis also agreed that Adams "said we are way overstocked in inventory, that he was going to reduce inventory from 4,000 tons to 1,000 tons," and that nothing would be shipped to Canada during 1994. According to Nellis, Adams asserted, "[T]hat he had come to [Respondent] to make cuts, and it would either be him or somebody else, and that he was going to do it." Of course, that had been the reality of Adams's position.

Kodluboy, too, agreed that Adams had reviewed Respondent's financial picture—loss of the Canadian market and average wage scale, as well as prices charged, by competitors—and had said that, while Respondent was profitable, it was only returning 5 or 6 percent on investment and "he was looking for a 20 percent rate of return or better." He agreed that Adams had said employee cost in Albert Lea was $22 an hour "versus I think it was $6.97 in Jerome, Idaho area," with the result "that he had to get the cost in line in Albert Lea or they would have to consider" producing twine in Jerome. Kodluboy also testified that he was informed by Adams that inventory was overstocked and that Respondent needed to decrease its level from 4000 tons to 800–1000 tons.

Both Adams and Kodluboy described a discussion about the layoffs, although their accounts diverge dramatically. The former testified, "I think Mike brought it up in at least a casual sense—we were concerned about our employees, we are anxious to get people back to work,—I don't recall that we really got into any constructive—that is not the right word, got into any great detail or what not beyond that."

Kodluboy described a more extensive discussion about layoffs. He testified that he had protested about supervisors and temporary workers doing unit work, while employees were on layoff, but that Adams had replied, "[T]here would be no supervisors that wouldn't be doing the work." Initially, Kodluboy testified that "I can't remember" what Adams said when Kodluboy said, "Well, we have to get the people back to work and get into negotiations and get this process moving." During cross-examination, however, Kodluboy agreed that Adams had said that he could not yet recall employees, because there still was too much inventory.

In the course of their discussion of layoffs, testified Kodluboy, he mentioned that seniority was not followed in layoffs after the one on April 11, and Adams responded, "Something to the effect that he needed a core of technical-minded people." According to Kodluboy, he mentioned that, based on his background, Adams surely must be aware that the Union's philosophy is that seniority is "a plant-wide concept," and Adams replied that he favored "departmental seniority, keeping a core of technical or technicians." Kodluboy agreed that Adams also had said that he was seeking to create job classifications at Albert Lea. Of course, all of the foregoing remarks, which Kodluboy admitted had been made to him by Adams, are consistent with positions and motives for previous actions, as described in preceding subsections.

Two other subjects were raised during the June 9 meeting. Kodluboy testified that Adams said he was anxious to get negotiations underway. Second, Kodluboy warned if there were disagreements during the negotiations, the Union might have "a corporate campaign"—applying pressure, even in England, on customers, shareholders, and others so that the Union could achieve its bargaining objectives. So far as the evidence shows, this had been the first threat made by either party about compelling the other to accept its proposals. And Kodluboy did not explain why he had chosen to begin threatening Adams during their initial meeting, before negotiations even had started.

[15] Exxon is a twine competitor of Respondent. Nellis also claimed that Adams had said, "[W]ages at Albert Lea would be $8.25 an hour or competitive or he would close the place." No other witness testified that Adams had threatened plant closure during this meeting. I do not credit that testimony.

The meeting adjourned with agreement to commence negotiations on June 15. Adams said that Operations Manager Drake, Production Manager Johnson, and Production Superintendent VanKampen would be representing Respondent during that bargaining session. Adams did not appear during the early negotiating sessions.

Before that initial negotiating session was conducted, Respondent began recalling some employees who had been laid off. VanKampen testified, "We recalled some people back in June due to an order we had gotten from S.T.C." which had been "a hugh order, or relatively huge for what they order."

By separate letters dated June 13, Gary Meckler, Mona Akemann, Donnell Dahl, and Paul Skatter were each notified, as "a follow up to our telephone conversation regarding your call back," that, "[y]ou will begin work at 6:00 am on June 16," with each employee assigned a shift on which he/she would be working. After the first negotiating session, recall letters were sent to Bonnie Anderson and Larry Madson on June 17, with both to return on June 20, and to Dale Haukoos and Phil Wolff on June 21, with Haukoos to return on June 27 and Wolff on June 29. Aside from motivation for these recalls, three aspects of those letters are significant to this proceeding.

First, the June 17 letters to Anderson and Madson contained language which differed from the other June recall letters: "You will begin work at 8 a.m. on June 20. You will be working a 9-hour day Monday through Friday through the next 2 weeks. Unless notified otherwise you will be laid off again after two weeks." In fact, that was a practice followed by Respondent throughout June and July; some employees were recalled for brief periods of work and were again laid off upon completion of the work for which they were recalled.

According to Adams, "We got orders for things that weren't in [inventory] and had more orders than we could fulfill [sic] at [the] production level that we were operating," with the result that, "we weren't walking away from profitable business so we recalled people as they were required to produce product for which we had orders." By fall, all employees laid off during the spring, save for the four discussed in subsection K who had quit, were recalled permanently, to produce product for the winter selling season, described in subsection C.

Second, when it did recall employees, Respondent concededly did not do so by strict seniority. Instead, it excluded five employees—McKane, Joel, David Gotland, Curt Lewison, and Lou Ann Hultgren—who were restricted as to the work which each could perform, because of physical limitation or injury. They did not receive notices of recall until near the end of the recall process, during September and October, when all or most of the Albert Lea employee-complement was working.

There is no dispute concerning Respondent's motivation for that changed recall procedure. It was followed for safety and for efficiency. As to the latter, VanKampen explained, "[W]hen you run with a skeleton crew you have to be able to perform more than one task and to accommodate the restricted people we have to set up one or two tasks that they can perform for that entire time they are working." No evidence shows a different motivation for the delay in recalling restricted employees. That is, there is no evidence that those employees had been especially supportive of the Union, nor that Respondent had been concerned about the depth of their union support in deciding to defer recalling them. Nor is there any basis for inferring that Respondent advanced its bargaining demands by skipping over them. In fact, as will be seen, the Union tended to agree with Respondent's reasoning.

Finally, in that latter regard, Respondent admittedly never informed the Union of plans to recall and, then, layoff employees. However, during the June 15 negotiating session, Respondent did notify the Union that restricted employees would be skipped over and not recalled in strict seniority order, as were other employees. Stepping out of strict chronological order, by letter to Kodluboy dated October 3, 1994, Human Resources Supervisor Kevin Miland listed five employees who were still then on layoff. As to Lewison and Hultgren, he explained that, as stated in a letter to Kodluboy on September 26, they "have been bypassed on callback because of extensive restrictions that do not allow us to safely bring them back at this time. We will look at bringing these two back when we receive restrictions from their doctors that we can accommodate."

In this subsection, the only allegations to be analyzed are whether the recalls and, also, the recall-layoff procedure had been motivated by considerations unlawful under Section 8(a)(3) of the Act. I conclude that a preponderance of the credible evidence warrants negative answers.

As was true of the group layoffs, there is no credible evidence that Respondent had been trying to utilize recalls and subsequent layoffs to influence the course of bargaining—more specifically, had utilized them to try to compel the Union to accept Respondent's proposals. Adams and VanKampen's above-quoted explanations, about recalling some laid-off employees to fill specific orders, were logical. Their accounts that such orders had been received, and had to be filled during the summer if Respondent wanted that business, were not contradicted. That is, even though some employees, such as Nellis, had worked throughout the overall layoff period—and, presumably, were aware of orders being filled during that period—there was no contradiction of Adams and VanKampen's description of Respondent receiving orders which had to be filled. Similarly, none of the recalled employees contested that testimony that when they had been recalled temporarily, they had filled orders which could not be filled from existing inventory.

The fact that many recalled employees were again laid off does not, of itself, show unlawful motivation. Respondent anticipated that the group layoffs would be of some duration. Unanticipated orders, which could not be filled from existing inventory, were received during the overall layoff period. So, some employees were recalled temporarily to fill those orders. It was not necessary to again layoff others and, consequently, their recalls were permanent. Nothing about this procedure furnishes a basis for inferring unlawful motivation.

That is, with respect to employees again laid off after their temporary recalls, Respondent was doing no more than restoring them to the layoff status which it had anticipated, when it had laid them off in April and May, that those employees would likely occupy throughout the ensuing summer and into the fall. The only actual change arose from unanticipated orders which occasioned temporarily interrupting their anticipated layoffs, by recalling them for brief periods to fill those orders before restoring many of them to the layoff status intended by decisions made from March to May, based upon a corrective course planned even earlier than March. Of course their recall, even temporarily, had been what Kodluboy said that the Union sought, as described above.

Nor can unlawful motivation be inferred from the fact that Respondent chose to skip over restricted employees in making

recalls. There is no basis for concluding that restricted employees were greater union supporters than unrestricted employees. There is no basis for inferring that skipping those employees, for temporary or earlier recall, somehow independently made the Union more receptive to Respondent's proposals, nor that Respondent believed such a consequence would flow from not recalling restricted employees to fill unanticipated summer orders.

In sum, I conclude that a preponderance of the credible evidence fails to establish that any of the group layoffs and any of the layoffs following recalls violated Section 8(a)(3) and (1) of the Act and, accordingly, shall dismiss those allegations.

As scheduled, on June 15 Drake, Johnson, and VanKampen met with Kodluboy, Nellis, McKane, and Campbell. From an overall perspective, the Union presented its initial printed proposal, the parties read through it, certain subjects were discussed, and the parties adjourned until June 30, so that Respondent would have an opportunity to review the proposal and prepare a counterproposal.

Following a "Preamble," the Union's "COLLECTIVE BARGAINING AGREEMENT (PROPOSAL)" has 19 articles: recognition-union security, dues checkoff; management rights; savings or separability clause; no strike-no lockout; discipline and discharge; grievance procedure; seniority; job postings and transfers; holidays; vacations; sick pay; leaves of absence; safety and health; hours of work and overtime; wages; health and welfare; pension and 401(k); nondiscrimination or harassment; and, term of agreement. Certain aspects of some are particularly significant in connection with subsequent events.

As mentioned above, there are provisions for union security and checkoff. Article II, "MANAGEMENT RIGHTS," provides:

> The Management of the plant and the direction of the working forces and of the affairs of the Company, including the right to hire, suspend or discharge for cause, and the right to transfer or lay off due to lack of work or curtailment of production shall be vested exclusively in the management of the company, provided that this will not be used for the purpose of discrimination for or against any employee, or to abrogate any other provisions of this Agreement. There shall be no contracting out of bargaining unit work. Supervisors shall not perform bargaining unit work except for emergencies.

Article VII, "SENIORITY," proposes, in section 7.04, that "Employees will be laid off and recalled on the basis of plant-wide seniority" and, further, that, "Laid off employees will be recalled in seniority order to the shift they were laid off from or to a shift they had previously held." Ten holidays are proposed in article IX. As to vacations, article X proposes, inter alia, 7 days paid vacation for employees with more than 1 year of seniority, 8 days paid vacation for employees with 3-years seniority, and progresses up to 15 days paid vacation for employees with 18 years of service. Section 10.12 proposes that pay for unused vacation time "will be made within one (1) month after the end of the vacation year," which section 10.01 proposes as being "from January 1 to December 31." Those vacation proposals correspond to essentially identical provisions in the Agreement between Respondent and the employee committee.

Article XI provides for 7 days of paid sick leave each year, with payment for accumulated sick leave in excess of 15 total days at year's end. No provision is made for a doctor's certificate to justify receiving sick pay. Sections 12.03 and 12.04 provide for paid funeral leave in specified situations. Section 12.06 provides for jury duty pay. Section 13.02 provides for a safety committee of at least four employees who "will work in conjunction with the management Safety Committee for the promotion of welfare and safety of the workers in the shop," meeting at least once a month for that purpose.

Article XIV proposes four separate shifts, each to work 12-hours per shift, with "Variance to this Schedule [to] be by mutual agreement between the parties." Article XV, "WAGES," proposes, "Substantial wage increases as provided for under Appendix 'A'." No Appendix "A" was included with the Union proposal. Article XVI, "HEALTH AND WELFARE," proposes, "As currently provided for in this Agreement to be negotiated and reflected in this Article." "PENSION AND 401(K)," article XVI, proposes: "As proposed under USWA and reflected in Appendix 'B.'" No appendix "B" was included with the Union's proposal.

Nellis testified that Kodluboy suggested switching to the Union's pension plan, followed by a discussion of possible tax impact on a rollover of those funds. However, Kodluboy conceded that the Union had not submitted a specific pension proposal.

As to the "Substantial wage increases" proposal, Nellis claimed, "I remember that distinctly, that it was explained to Mr. Adams that this was just put in there basically to fill the space, and . . . we understood that we were going through a wage freeze, and at no time did we ever intend to ask for any substantial pay raise. And that was explained to Mr. Adams." Yet, it is undisputed that "Mr. Adams" had not attended that negotiating session. Further, there is no mention of such an explanation in the notes Nellis prepared of that session. And Nellis conceded that "if it is not in my notes, you know, I can't hardy recall June without something to jo[g] my memory," and "without any kind of notes or something to look at, I would have a very hard time remembering what happened eight months ago."

VanKampen denied that Nellis had even indicated during the June 15 meeting that the Union was not looking for a substantial wage increase. Kodluboy testified that the "Substantial wage increase" language is "a standard term we use . . . when you don't put a figure there." However, neither he, nor any other negotiator for the Union, corroborated Nellis's testimony that Respondent's representatives had been told on June 15 that a substantial wage increase was not expected and that a wage freeze would be acceptable.

Kodluboy acknowledged, "I probably anticipated that" Respondent would not agree to the substantial wage increase proposal, in light of statements by Adams during the June 9 meeting. In fact, Kodluboy admitted, as "correct," that a proposal for a substantial wage increase "was going in the opposite direction from contract formation," even though he knew that Respondent was in a hurry to reach a contract. In that respect, Kodluboy denied that he had been trying "to string out negotiations for as long as possible," so that employees would continue to receive their then-current wages and benefits. Still, he allowed that it was "a fact" that the longer negotiations took, the longer unit employees would continue receiving those wages and benefits.

In that connection, it is undisputed that Drake warned that the longer negotiations took, the greater the pressure would be

on Respondent to move to Jerome. For, Kodluboy agreed that Drake had said that Respondent needed to know where the Union was going with economics because of their impact on what would happen with the Jerome plant. Significantly, Nellis testified that Drake had said that, "The longer that negotiations took, the longer the layoffs would be, and if they took too long they would move it to Jerome." However, no other witness corroborated his testimony that, during the June 15 negotiating session, lengths of layoffs had been tied by Drake, or by any other negotiator for Respondent, to length of negotiations.

The subject of recalls from those layoffs was discussed. The Union pointed out that it wanted to get the laid-off employees back to work. Respondent's officials gave notice that Adams did not intend to recall in seniority order employees with work restrictions, due to disability. Kodluboy said that he did not agree that those employees should be bypassed for recall, pointing out that such a procedure might violate the Americans With Disabilities Act. When it was explained that Respondent had changed recall procedure in the interest of plant safety for employees working there, however, the Union's representatives stated that safety was one of the Union's highest goals. Kodluboy requested information concerning whether the restricted workers were on Workers Comp or on layoff. So far as the evidence shows, he was provided with that information. At least, there is no allegation that Respondent did not do so. There is no evidence that the Union requested further bargaining concerning the subject of not recalling restricted employees in strict seniority order.

As to the Union's seniority proposal, Drake said that Respondent wanted to make layoffs and recalls on the basis of ability and merit, rather than strictly by seniority. With regard to checkoff, Respondent objected that it had no space on its computer for an added entry for checkoff deductions.

Both Nellis and Kodluboy testified that the Union took the position that it wanted to conclude negotiations concerning "language" before addressing economic issues. Thus, Nellis testified, "[W]e wanted to discuss the language first, because of course the language of a contract will directly impact the economics and we need to know where we are with the language."

Kodluboy testified to similar effect, although in the process he provided somewhat interesting examples of what he regarded to be "language" issues. Thus, he testified that when Respondent's representatives had asked about "the economic stuff," he had answered, "normally employers want to get the language out of the way first because it does have an economic impact on whatever the economic package is," mentioning as illustrations of "language" issues, "the number of holidays, vacations, and vacation schedules and all the other benefits that go with it," as well as overtime.

It was that position, testified Kodluboy, which led Drake to say, "[T]hat he had to have the economic proposal, total economic proposal so that he knew how he was going to react otherwise they were going to have to think about relocating to Jerome, Idaho." Nevertheless, Kodluboy acknowledged that his position had been that he wanted to do the language first before discussing economics, for he claimed, "I truly thought that's what they wanted to do first." But, Kodluboy did not explain how he could have "truly thought" that, given his own admission that Respondent's officials had told him that they wanted an economic proposal and wanted to discuss economics.

After reviewing the Union's proposal following that meeting, testified Adams, he concluded that it "looked pretty much like what they go into with most other companies outside of basic steel" and "I didn't think they took any recognizance of the information that [Respondent] had tried to put forward up to that point." He appeared particularly perturbed about the "Substantial wage increases" portion of the Union's proposal. And he denied that anyone from the Union ever told him that the Union did not truly mean that particular proposal. Indeed, any such assertion would collapse in the face of the Union's own later assertions, after it proposed a wage freeze, that its subsequent proposal represented a concession from its initial wage proposal.

Adams prepared a counterproposal and transmitted it to Kodluboy by letter dated June 24. To the extend pertinent, that letter states:

> We have received and reviewed the [Union]'s contract proposal. We were somewhat disappointed that the proposal did not appear to address any of [Respondent]'s economic or operating issues which we have raised both with the employee group as a whole and with the [U]nion over the past several months. As you know, we notified the employees prior to the organizing effort that the current cost structure and operating parameters were not sustainable.
>
> To reiterate, our primary concerns are the following: The Albert Lea facility produces an inadequate return on our investment, wages and benefits at the plant are high for the community and out of line with the industry, we have an under-utilized facility in Idaho with better economics that could produce much of what we make at Albert Lea, and we are losing market share because of an inability to be price competitive due to high production costs.
>
> We need to respond to the highly competitive conditions of our industry. This requires competitive wages and a flexible operating environment. Our contract proposal, which attempts to address these serious issues is attached.

As to the enclosed counterproposal, Adams testified that he worked from a model agreement prepared by counsel, from an agreement between another local of the Union and one of Respondent's sister firms, and from past agreements which he had negotiated with other locals of the Union. He testified that his counterproposal "was developed in the context of having received a proposal that I thought was pretty unrealistic. Obviously we have to have room to bargain too, so they didn't take account of any of the concerns [Respondent] had raised and I wrote a company agreement."

The headings of that counterproposal are: Purpose and Intent, which included the recognition provision; management rights; savings or separability clause; no strike-no lockout; seniority, job bids, layoff & recall; hours of work and overtime; wages; holidays; vacations; sick pay; group insurance; pension; discipline or discharge; grievance procedure; shop rules; physical examinations; and, solicitation.

The counterproposal contains no union security nor dues-checkoff provisions. Article 1 added the modifier "hourly" at the beginning of the certified unit description, set forth in subsection A. It also added the classification "technical employees" to the unit's exclusions. As a result, in article 1.02, Re-

spondent was counterproposing that the Union be recognized as the exclusive representative of employees in a unit of:

> All hourly, fulltime production and maintenance employees employed by [Respondent] at it's [sic] Albert Lea, MN facility; excluding office clerical employees, confidential employees, professional employees, managerial employees, supervisors, guards, and technical employees.

No issue is raised by the addition of the modifier "hourly." But the General Counsel does challenge the added exclusion—"technical employees"—as an attempt to change the scope of a certified bargaining unit.

Adams denied that he had been trying to change the certified unit by adding that exclusion. Rather, he testified:

> The technical employee addressed one issue, Renaux, Bob Renaux. Between the time of the Union certification, whatever you call it, and the time we made the proposal we created a new job and added a new employee. I call him a "chemist," apparently it's some kind of "poly-something" engineer, and the reference was meant to clarify our position in regards to Bob Renaux.

Similarly, Production Manager Johnson testified: "The understanding I had this would cover a person such as Bob Renaux who is a composite engineer who has gone through a course and has technical expertise that we do not have in the plant until he came." Thus, according to Johnson, the added exclusion would apply:

> To Bob Renaux or in the future if because of the expanding technology if we had to bring in someone who would probably come in on a salaried basis, for instance, we've gone to a lot of machines that are electronics; what if we needed an electronic engineer in there; what if needed a refrigeration person who was on-call for 168 hours a week, we would consider them a part of management, so, it was people that were bringing skills to the company that the company could not provide for them through a training program.

Article 2 of the counterproposal pertains to management rights. Section 2.01 provided:

> The management of the facilities and the direction of the work force and general affairs of the Company shall be vested exclusively with the Company. Further, the Company shall retain all rights which it possessed prior to entering into the Agreement, except as expressly abridged, limited, or qualified by a specific provision of this agreement.

It then continues by enumerating a series of specific rights retained by Respondent. Included are:

> Make work rules and regulations and change such rules and regulations; and to suspend, dismiss, or otherwise discipline any employee violating such rules and regulations.
>
> Determine the size and composition of the work force.
>
> Introduce new or improved performance methods or facilities.
>
> To establish incentive compensation programs to encourage and/or reward individual effort, productivity, health & safety, attendance, or any other desirable goal as determined by management.
>
> Reduce the work force, if, in the Company's sole judgment, new equipment, circumstances, or methods requires fewer employees.
>
> Subcontract work for any reason whatsoever, even if production or maintenance employees are displaced by such subcontracting.
>
> Fix standards of quality and quantity of work.
>
> Control the volume of production and the scheduling of operations.
>
> Change schedules, processes, and work loads.
>
> To establish and change the length of shifts, the length of the work week, and the hours of work for any employee as determined by the needs of the business.
>
> The right to hire temporary, part-time, summer, or specially skilled employees as such may benefit the business in management's sole judgment.
>
> The Company shall have the unrestricted right to assign any work whatsoever, including work normally performed by members of the bargaining unit, to supervisors in order to gain the maximum productivity from all employees and from the facility.
>
> Split up work among and between jobs, and/or abolish jobs because of technological or other changes, and discontinue or merge departments even if such changes result in the layoff of bargaining unit employees.
>
> Abolish past work customs and practices which it determines, in its sole judgment, are inefficient and costly.
>
> To determine the number of hours per day or week that operations are to be carried on.
>
> Allocate the number and location of facilities.
>
> Liquidate and close down the business or any part thereof, for any reason whatsoever.
>
> Hire, train, suspend, discipline, discharge, promote, demote, transfer, release, and lay off employees.

Following that enumeration, article 2 of the counterproposal includes two additional paragraphs:

> The listing of these specific rights in this Agreement is not intended to be nor shall it be restrictive of or a waiver of any of the rights of the Company which are not listed herein whether or not such rights have been exercised in the past.
>
> It is further understood and agreed that the prerogatives of the Company as stated in this article are not subject to the grievance or arbitration procedure except those prerogative relating to discipline, discharge, suspension, promotion, demotion, and release.

The seniority, etc., counterproposal of article 5 proposes that seniority "be kept on the basis of departmental and total company seniority," and, "In the event of a layoff . . . the least skilled employees will be laid-off first beginning with the general laborers. Management has the sole right to determine the skill level of employees." Included in section 5.03 is a counterproposal that, "[m]anagement will routinely evaluate employees and periodically discuss with them their performance so that they may know their status." As to vacancies, article 5.12 provides for departmental seniority, subject to management's sole determination as to whether following seniority will "interfere with plant efficiency and production" and as to whether an "employee has the ability to do the work."

Article 8 provides for six paid holidays. Article 9 provides for 24 hours of paid vacation after 1 year of continuous service,

and for 40 hours of paid vacation after 5 years of continuance service. Under article 10, "bargaining unit employees will receive no pay for time off sick."

Article 7 provides that wages are to "be paid according to the Wage Appendage attached hereto." In contrast to the Union's proposal, attached to Respondent's counterproposal is a "Wage Appendage"—a chart providing for job classifications and grades, which specifies wage rates for employees in each class and rate:

Job Class	Description	Rate 1	Rate 2	Rate 3	Rate 4
1	General Laborer	$5.00	$5.50	$6.00	$6.00
2	Operator	7.50	7.75	8.25	8.50
3	Maintenance-Junior	8.00	8.50	8.75	9.00
4	General Tech	9.50	10.50	11.00	11.50
5	Extruder Tech	11.00	11.50	11.75	12.00
6	Maintenance-Master				
7	Mechanic	10.00	11.50	12.00	12.00

Rate 1—Probationary
Rate 2—End of probation to 1 year
Rate 3—Over 1, less than 3 years
Rate 4—Over 3 years
Night shift premium shall be 10¢ per hour.

With regard to that "Wage Appendage," Adams testified that he had never experienced a manufacturing collective-bargaining contract that did not include job classifications and grades. As to the wage rates, he further testified that, following an exchange of wage surveys, "I targeted work out with our actual demographics that the weighted average wage rate would be about $9.00 an hour and at that point Exxon was $8.75," with the weighted average also being higher than what Respondent was paying in Jerome.

In that regard, Kodluboy acknowledged that he had been provided by Adams with comparative wage rates paid by Exxon and, also, paid in the Albert Lea area. He did not challenge the accuracy of those comparisons. He agreed that the above-quoted proposal is in line with those comparative rates.

Article 12.01 states, "The Agreement between the parties regarding pensions is set forth in the pension appendage." But, the "Pension Appendage" recites only: "The Company anticipates a plan similar to the existing plan, but with a Company matching contribution." Also attached to the counterproposal is a "Health & Insurance Plan Appendage." Its text states merely, "Details to be developed." However, section 11.02 of the counterproposal's "Group Insurance" counterproposal states: "The Company reserves the right to change insurance carriers and coverage as it deems appropriate at its sole discretion."

After examining the June 24 letter and enclosed counterproposal, Kodluboy testified that he had regarded the latter as an insult, because "I didn't believe it was real." More particularly, he testified that he had been "incensed that [Respondent] had a contract [counterproposal] that had significant wage concessions in it." Of course, wage concession counterproposals should not have been unanticipated, given the information imparted to Kodluboy on June 9, and to the employees whom he represented before that date. In the circumstances, a claim of being "incensed" about concessions proposals appeared feigned.

Kodluboy further testified that he had been perturbed, as well, about the management rights, seniority, holiday, and vacation counterproposals. So, he responded by letter, dated June 30. In pertinent part, that letter states:

> Please be advised that we take issue with your statements in that [June 24] correspondence. You state in the very first paragraph that you are somewhat disappointed that we did not address your economic and operating issues, and you claim that the employees as a whole as well as the Union were informed of these concerns before the organizing effort.
>
> Sir, that simply is not true. You did not discuss at any time, with the bargaining unit or this Union, what your economic wants and needs would be, nor did you discuss what your operational goals would be until the June 9, 1994 meeting at our office. You did that long after company knowledge was established. Furthermore, we believe that you intentionally laid off members of the bargaining unit so as to intimidate your loyal workers into submission to your outrageous demands. You, sir, have apparently decided to re-write history to your liking.
>
> The counter-proposal that I received was an insult to the entire body of employees. We will negotiate on June 30, 1994 in good faith. We can only hope you will do the same. Please don't bother to threaten us in the future. We can and will take whatever legal action is required if this situation prevails.

When he testified, Kodluboy's attention was directed to those statements in his letter. He admitted that the issues raised in Adams's June 24 letter had not been "new" ones and, moreover, that those issues had been raised before by Respondent. He claimed, however, that he had not been aware until June 9 of Respondent's operational goals and of its "economic wants and needs[.]" This testimony appeared to be but another example of the type of disavowals to which I referred in subsection L.

Asked if the unit employees had not made him aware of what had been said during their prior meetings with Respondent's officials, Kodluboy first answered, "There was never a monetary amount or statement on reduced benefits until the June 9th meeting that I am aware of." Of course, implicitly that answer, while nonresponsive, does show that Kodluboy had been familiarized on June 9 with the extent of monetary concessions which Respondent would be seeking during negotiations.

Asked, again, about what employees had said to him regarding information imparted to them by Respondent—concerning excess wage rates, lost market share and the lost Canadian market—Kodluboy replied: "You know, I've tried to research back in my head and I don't know of any time anyone told me anything of this nature of a monetary amount or a benefit reduction until June 9th." But, since he had been informed of those monetary amounts and benefits reductions on June 9, Kodluboy did not explain why he had become "incensed" upon seeing them in Respondent's counterproposal.

Apparently, Kodluboy's June 29 letter had not been received by Respondent before the negotiating session of June 30 had been conducted. Accompanying the Union's usual negotiating committee members had been Duane Geisler. He handles pensions and, apparently, health and insurance matters for the Union. Over an hour at the beginning of that session was taken up by his presentation of a pension program and by discussion of a medical plan. That discussion had been conducted primarily between Geisler and Drake. There is no contention that the

substance of their discussion led to a violation of the Act. So, a recitation of it is not necessary.

Following the meeting, the two men continued communicating with each other, exchanging information about and discussing their respective party's pension and health programs. Neither one testified about those communications. As a result, while Kodluboy occasionally testified that problems had arisen during discussions between Geisler and Drake, and complained that Geisler had not always received promptly information which he requested from Respondent, there is no firsthand account based on personal knowledge, see, Fed.R.Evid. 602, showing that Respondent ever had refused to provide relevant information requested by Geisler. And there is no allegation of unlawful refusal by Respondent to provide relevant information requested by him. Accordingly, I place no reliance upon secondhand accounts of supposed impropriety by Respondent in connection with discussions between Geisler and Drake.

After Geisler was finished on June 30, Respondent's negotiators renewed expressions of their desire to discuss economics. But, the Union's negotiators reiterated that they wanted to first resolve language issues. For example, Kodluboy testified, "I believe what I said was that it's normal to get the language out of the way first," and, "I said that was my desire." Kodluboy agreed that Respondent's negotiators had said that Respondent was under pressure to get the economic issues resolved in view of decisions which needed to be made in connection with the coming fall production schedule.

Kodluboy protested that he was, "Shocked by the amount of pay decrease" in Respondent's counterproposal. He said that the Union would consider concessions only if Respondent would open its books, to justify its wage counterproposal with a demonstration of losses. When testifying, he conceded that Respondent had never contended that it had been operating at a loss. Nonetheless, on June 30 Kodluboy did make a formal demand that Respondent open its books.

With respect to the subject of concessions, Kodluboy acknowledged that the Union's "general philosophy" is not to agree to wage concessions unless the employer demonstrates that it is losing money. He testified that "if they're in a tight financial situation that is a factor we consider," but "as a general rule," unless a company proves it is losing money, the Union will not agree to wage concessions. Nellis confirmed that position, testifying that Kodluboy's strategy had been to not agree to wage concessions unless Respondent could establish that it was losing money.

As the meeting progressed, Kodluboy once more protested both that "medically injured employees" were not being recalled and, also, that supervisors were performing unit work, while employees were on layoff. As to the latter, Nellis testified, "[O]ur position was that supervisors should not be doing union labor." Kodluboy explained his position about that issue as follows:

> Well, generally one picks a supervisor to supervise, and a production worker to do the work. They got to take care of the schedules, they got to make sure the product is there, a whole myriad of tasks that a supervisor does that are separate and apart from what the—if you were going to just hire a supervisor to sweep why would you need him?

Nellis further testified that Kodluboy also protested that outsiders, nonemployees, were performing unit work, while unit employees were left on layoff. Still, there is no evidence that the Union sought to interrupt contract negotiations to discuss any of those issues, perhaps because they were economic ones which Kodluboy appeared to want to avoid addressing—at least until "language" issues were resolved. In any event, there is no evidence that Respondent ever expressed unwillingness to discuss the subjects of deferring recall of restricted employees from layoff, nor of June–October performance of unit work by supervisors and by outside labor.

As to the counterproposal's recognition provision, the Union questioned the "technical employees" addition to the unit exclusions. Nellis testified that Respondent's negotiators were not able to explain the reason for it. VanKampen's notes show that the Union proposed adding "as defined in the act [sic] number 18–RC–15576" to the recognition clause. As will be seen, that is what Respondent did do.

According to those notes, the accuracy of which is not challenged, and which are the most complete evidence of what transpired during review of the proposal and counterproposal on June 30, the Union sought "compromise" on the management rights article and needed to review the counterproposal's seniority provisions.

From the standpoint of the complaint's allegations, the most crucial aspect of this meeting occurred near its conclusion. Prior to this negotiating session, Adams had given Johnson three "extra-contractual" points and five other points about which Respondent was "serious." Adams instructed Johnson to impress upon the Union both sets of points during the June 30 session. The "extra-contractual" ones pertained to retention by Respondent of ability to relocate work to Jerome, to contract out work and to change work schedules for health and safety reasons. The five other points were contractual objectives sought by Respondent: competitive economic position, open shop, recall and promotion by ability rather than seniority, multiple job grades, and ability to continue assigning supervisors to perform production and maintenance work.

To be certain that he properly followed that instruction, Johnson prepared a computer-printed list which included all eight points. However, for personal reasons, Johnson chose to editorialize on that list with respect to those points, adding his personal thoughts after most of them. As a result, his list reads:

> Points to make which are extra-contractual.
>
> 1. We have the right and the option to move work to Jerome at any time.
>
> This will end up as a contractual issue. It is important that the [U]nion realize the implications of this economic issue. This is a seasonal business and we must be ABLE to manufacture to the needs of our customers.
>
> 2. We will contract out work. This must be addressed separately.
>
> 3. Changing the shift schedule will be done for health and safety reasons.
>
> Points concerning our proposal.
>
> 1. Economics. We will end up with a contract that is competitive for our industry and Freeborn County. Bill is absolutely serious on this issue.
>
> 2. Bridon will be an OPEN SHOP. We are not obligated to have a closed shop.
>
> We will not agree to CHECK-OFF. It will be their responsibility to collect dues.

> 3. The [U]nion must understand that recall or promotion will be by ability, not seniority.
>
> 4. We will have multiple job grades.
>
> 5. Supervisors WILL work. The company owns everything. The Union owns nothing. We will make work rules. We will determine who, when, and where.
>
> We will have the freedom to contract out work at our disgression [sic].

Johnson denied that he had read his editorial comments during the June 30 meeting. He testified that he had only read the points as Adams had instructed him to do. Whether he did or not, however, is not the crucial point of dispute about what Johnson may have said concerning those eight points.

Nellis testified that, in connection with the list, Johnson had said "these were not negotiable items." Kodluboy corroborated Nellis in that respect. Johnson denied that he had made such a statement; VanKampen corroborated that denial. Moreover, Adams testified that he had not instructed Johnson to make a statement, when presenting the points to the Union's negotiators, that they were nonnegotiable.

Two interesting aspects emerged from the accounts by Nellis and Kodluboy concerning Johnson's asserted "nonnegotiable" statement. First, while both men made notes of the points recited by Johnson, a "nonnegotiable" remark by Johnson in connection with those points appear nowhere in the notes of either man. Yet, Nellis acknowledged that such a statement would have been "a pretty important issue," and, it should be remembered, from subsection M, that Nellis conceded that, without having his notes to refresh his recollection, "I would have a very hard time remembering what happened eight months ago," that is, during June 1994.

The second aspect of the "nonnegotiable" assertion involves the union negotiators' reaction to that purported statement by Johnson. Nellis testified, "We made no response, no." However, Kodluboy contradicted that testimony, describing a somewhat prolonged exchange following Johnson's supposed "nonnegotiable" announcement:

> So, I said, "Look, I know you're messengers," and says, "You probably never have been through this process," which they readily agreed to, but I said, "Do you realize there are some mandatory subjects of bargaining in the points that you said about which you don't have to agree, but they've got to be negotiated."

When Drake acknowledged "that he could understand that," testified Kodluboy, "I says, 'I believe you're in violation of the National Labor Relations Act"' but Johnson retorted: "I'm telling you this is the way it's going to be. They're not negotiable."

Obviously, the foregoing testimony by Kodluboy conflicts with the description of the same incident given by Nellis when he testified. Significantly, on the day after this negotiating session, according to the date appearing in its lower right "(date)" space, an unfair labor practice charge was prepared by Kodluboy. It became the charge in Case 18–CA–13178. In the "Basis of the Charge" portion of it, there is a quite detailed enumeration set forth by Kodluboy of allegedly unlawful acts by Respondent. Though that enumeration includes such matters as "unilateral changes" and "outrageous demands," no mention whatsoever appears there of announcements about mandatory bargaining subjects being nonnegotiable. In light of all the foregoing considerations, I do not credit the testimony that Johnson had said that the eight points, or any of them, were nonnegotiable.

As pointed out above, Kodluboy's June 29 letter apparently had not been received by Respondent until later in the day on June 30, after the negotiating session had ended. Adams testified that, after reading the letter, "my understanding was that he had trashed our document, that he had tossed it out and expected us to start over," and, further, Kodluboy "again appeared to move to directly threatening us." Adams explained that he had reached those conclusions based upon Kodluboy's above-quoted statements, in his letter, characterizing Respondent's counterproposal as "an insult," warning Adams "not to threaten us," and threatening "legal action."

Adams further testified, "I couldn't and didn't believe" Kodluboy's statements about lack of knowledge concerning Respondent's "economic wants and needs" and its "operational goals." In that connection, Adams explained that he had informed the employees, during March and April meetings, about "the first layoffs in the history of [Respondent], talked about the Jerome issue that we had lost twenty-two percent of our market in Canada, and it was implausible to me that the [U]nion official organizing a facility for whom those issues had been presented would never hear about them[.]"

Adams agreed that he never had informed the employees of the precise amount of wage reductions which Respondent would be seeking. However, he pointed out that he had informed them about wages being paid by Respondent's competitors and, consequently, he did not think there should be any surprise "that our opening wage proposal should be no higher than what our competitors pay." In fact, there was no contention that Respondent's initial wage offer had not corresponded to its competitors' wage scales.

In addition, Adams testified that Kodluboy's June 29 letter had represented the first occasion on which the Union had said anything to him about the layoffs being motivated by an intention to intimidate employees. That testimony was never contradicted, even though by then, Respondent had met with Kodluboy on June 9, 15, and 30. In sum, testified Adams, "I was shocked and offended by both the tone and the content of" Kodluboy's June 29 letter.

Adams proceeded to prepare a reply letter. It is dated June 30. In pertinent part, it states:

> Having received your letter of 29 June 1994, I feel compelled to set the record straight on some matters of fact. We first notified the employees of the fact that the existing arrangement on pay, benefits, and work practices was not acceptable to [Respondent] at a meeting of the Employee Committee on 2 February 1994. Notes of this meeting were circulated to all employees.
>
> A formal notice that [Respondent] wished to negotiate with the employees to reach an acceptable arrangement on pay, benefits, and work practices was given at a meeting of the Employee Committee on 2 March 1994. Again, notes were circulated to the employees.
>
> On 23 March 1994 I personally met with representatives of the employees and covered management's concerns about labour cost, inventory levels, and other issues in great detail. Attendees included representation for the [Union] Organizing Committee.
>
> On 25 and 26 April 1994, I held meetings open to all employees to cover the issues discussed at the 23 March

1994 meeting. Attendance was good and included most, if not all members of your organizing committee.

Each of these meetings included many participants and they were well documented. Given these facts I am incredulous that you could say that you were unaware of our economic and operational concerns prior to 9 June 1994. You might wish to review this with your own people.

Further, I cannot accept unchallenged, your assertion that we have intentionally laid off workers to intimidate our employees. I have personally taken great pains to explain the reasons for our production cut back both to the employees and to you. I have also discussed with you that no "light duty" positions are available while we are operating a reduced schedule. But we agreed that if any employee who is on work restrictions feels qualified to perform the jobs currently open, we would be happy to review their situation with an appropriate medical professional.

We are also baffled by your insinuation that we have "threatened" the Union. We have explained the economic facts of life as we see them. In fact, it is the Union which threatened. You made the comment at our meeting of 9 June 1994 that you would "go after" the other operations of [Respondent] including those in the UK if we did not reach an acceptable settlement with you.

Finally, our negotiators informed me after this morning's meeting that you still refuse to discuss economic issues. Since economic issues will be the core of the agreement, we can not allow this situation to persist.

Both Adams and Kodluboy testified that the latter never answered the June 30 letter. Nor is there any evidence that the Union, or any of its representatives, disputed any of that letter's assertions. Furthermore, there is no evidence that the Union ever accepted the letter's offer to review the situation of employees on restricted duty "with an appropriate medical professional."

N. Events and Negotiations During July 1994

The General Counsel alleges that, on or about July 5, Respondent transferred work from Albert Lea to Jerome, as part of its assertedly ongoing effort to compel the Union to accept whatever bargaining proposals were made to it, in violation of Section 8(a)(3) and (1) of the Act. It is not disputed that, during July, Respondent did increase production to 50-percent capacity at the Jerome facility. To accomplish that, it began full-time operation of the two production lines which it previously had been operating only half time, as described subsection C. The number of full-time production and maintenance employees at Jerome was increased to between seven and ten during the months of July and August, whereas before Respondent had employed only between one and three employees there.

VanKampen acknowledged that increased production at Jerome had an impact on the volume of production in Albert Lea. But, Adams characterized it as "relatively minor[.]" Indeed, there is no evidence that there had been any significant or substantial effect on Albert Lea production as a result of increasing production at Jerome to 50 percent of that facility's capacity. In fact, after July all of the laid off Albert Lea employees, save for those who had quit, were recalled and, so far as the record discloses, have worked steadily there, save for those who later retired or quit. There is no direct evidence that increased Jerome production caused Respondent not to replace Albert Lea employees who quit or retired.

To be sure, increased production at Jerome created product that had to be sold somewhere. Still, that does not, of itself, mean that those sales resulted from production conducted there at the expense of Albert Lea production. It is not disputed that, as Adams explained, Jerome "is the center of a large haying area where we can produce twine right there" and not have "to ship it across the country." Consequently, there is a market to which Albert Lea produced twine might not have been sold, due to distance. Moreover, it is undisputed that the cost of production at Jerome is lower than at Albert Lea. As a result, twine produced in Jerome can be sold at lower prices than twine produced at Albert Lea. In consequence, as VanKampen testified, without contradiction, production at Jerome "allows us to produce twine at a lesser cost and probably capture back or hopefully capture back some of our market share that we are continuing to lose" due to high production cost at Albert Lea.

In short, production at Jerome allowed Respondent to sell to customers who would not have purchased Albert Lea produced twine, because of its cost. There is no basis in the record for inferring or concluding that twine produced at Jerome after July, or any significant portion of it, had been sold to customers who had previously been buying twine from Respondent, before that month, produced at Albert Lea.

Beyond that, Respondent's decision to increase Jerome production, to 50 percent of plant capacity there, had been a decision made firmly even before the Union began organizing Albert Lea employees. During October 1992, Bennecon had recommended increasing production at Jerome, as noted in subsection E. Implementation of that action, in effect, had been deferred in light of ACT's objections to operational changes. Nevertheless, as discussed in subsection G, increasing Jerome capacity to 50 percent of capacity there had been approved, if ACT's assets purchase did not materialize, during the November 1993 budget meetings. There is no dispute that such a production increase would be an economically logical course to follow, as reviewed in those subsections and in subsection H. That is, as reviewed in the latter subsection, the decision to increase Jerome production to 50-percent capacity had been based solely upon operational—not labor related—considerations.

In light of the foregoing events, there is credible evidence showing that, even before advent of the Union's campaign, Respondent had made an operational decision to increase production to 50-percent capacity of the Jerome facility. That decision was supposed to be implemented during 1994's second calendar quarter. As it turned out, that did not occur until during the first week of the third calendar quarter. Still, that slight delay is not so significant that an inference of improper motivation can be constructed on the basis of it.

Significantly, since 1993 Adams had regarded the question of how much beyond 50-percent capacity to increase production at Jerome as a question to be resolved during negotiations, first with the employee committee and, then, with the Union. Yet, there is no evidence that, during the course of over a year's negotiations, Respondent has increased Jerome production significantly beyond that 50-percent capacity level. That is, there is no evidence that Respondent has started using the unused two production lines there to conduct operations. If Respondent had intended to utilize increased Jerome production to intimidate the Union into accepting Respondent's proposals,

that would have seemed a logical course to follow. While not determinative, see, e.g., *Handicabs, Inc*., 318 NLRB 890 (1995), the fact that Respondent did not increase Jerome production beyond the 50-percent capacity level is a factor which tends to diminish the persuasiveness of the General Counsel's unlawful motivation theory. So, too, does the fact that Respondent recalled all laid-off employees, who had not quit, rather than switching to Jerome production for the busy last calendar-quarter, January selling season.

In sum, a preponderance of the credible evidence shows that the decision to increase Jerome production, to 50 percent of capacity there, had been an operationally oriented one that predated advent of the Union at Albert Lea. There is no basis for inferring that Respondent would not have pursued that course as planned, even absent the Union's representation of Albert Lea employees. Nor is there any basis for independently inferring that the July increase in production at Jerome had been unlawfully motivated, nor part of an overall scheme to compel the Union to accept Respondent's proposals. Therefore, Respondent did not violate Section 8(a)(3) and (1) of the Act by increasing production at Jerome during and after July 1994, and I shall dismiss that allegation of the complaint.

As described in subsection K, during the April 6 monthly meeting with the employee committee, Respondent had given notice that it would be implementing "an employee evaluation program." Under that system, each week supervisors would rate each employee he/she supervised. A numerical rating would be written down for each of five categories: work quantity, work quality, job knowledge, dependability, and working relations. Once a month supervisors would, in effect, review the weekly ratings for the past 4 weeks and prepare a monthly evaluation, assigning for each category a composite evaluation of outstanding, above average, average, below average, or unsatisfactory. Then, each supervisor would meet with each employee supervised and review that evaluation.

Not until July 1994 did Respondent's supervisors begin meeting with employees for monthly evaluations. Thus, not until June had Respondent's supervisors begun preparing weekly ratings. There is no contention that Respondent had been unlawfully motivated when it implemented this evaluation system. But, Respondent never notified the Union that the system was being implemented. In consequence, the General Counsel alleges that its implementation constituted an unlawful unilateral change which violated Section 8(a)(5) and (1) of the Act.

Resolution of that allegation will be made in section II, infra. Here, it is important only to point out that Respondent's witnesses testified that the delay, from April to June, in implementing the system has been because, VanKampen testified, Respondent had wanted its supervisors to undergo training, to make "sure things would be more consistent or keep it consistent." Thus, training was arranged for them at South Central College and that training was conducted during the spring.

Prior to 1994, Respondent's supervisors had followed a practice of reviewing with each employee his or her work. Those reviews were conducted informally at approximately 6-week intervals. However, there is no evidence that any written record of those meetings was made. In fact, Shift Supervisor Wright admitted that no written evaluation was prepared for, nor as a result of, those informal evaluations: "I never kept records." There is no evidence that any other shift supervisor followed a contrary practice.

Respondent's witnesses testified that, as of the February–March phase of hearing in the instant consolidated proceeding, Respondent had taken no personnel actions on the basis of completed evaluations and weekly ratings. Still, Adams acknowledged that the purpose of an evaluation system, as he viewed it, is to be "part of the annual review for compensation and promotion and different things are—promotability—different things are tied into that." For example, as to discipline, he testified, "We simply have a record to document why we did the discipline." Indeed, after the monthly meetings with each employee, completed evaluations and ratings are inserted into those employees' personnel files. In these circumstances, it cannot be maintained with any degree of persuasion that the evaluation system could not have any affect on employees' employment situation, even if such affects were potential ones as of February and March 1995.

At the conclusion of the June 30 negotiating session, the parties scheduled succeeding sessions for July 5 and 12. Kodluboy testified that it had not been until July 5 that he had received the copy of Adam's June 30 letter, which had been mailed to him. Nevertheless, he claimed that he had seen that letter before July 5: "I had to get a copy of it down here [in Albert Lea] from my committee because it hadn't gotten to the office [until] July the 5th." Yet, while the letter, itself, shows that copies were transmitted to Drake, Johnson and VanKampen—Respondent's negotiators—it does not show service of copies on any of the employee-members of the Union's negotiating committee. And neither Nellis, McKane, nor Jeff Campbell testified that he had received a copy of Adams's June 30 letter, much less transmitted a copy to Kodluboy.

In preparation for the July 5 session, Respondent took two steps. First, Adams prepared another letter for Kodluboy. It is dated July 3, 1994, and states, in relevant part:

> There seems to be some question on the part of your negotiating teams as to [Respondent]'s position regarding future production at our plant in Jerome, ID. So that there might be no misunderstanding, I want to clarify the matter for you here.
>
> In July, Jerome will operate at about half of its designed output. We enjoy substantially more favorable [labor] rates in Jerome. It is therefore in the clear economic interest of [Respondent] to produce as much as possible of our output at Jerome.
>
> Since the work force at Albert Lea is represented, we believe that we have a legal obligation to negotiate with the Union prior to making a final decision to relocate work based on [labor] cost. We have notified you at each meeting of our desire to proceed with such negotiations. So far you have been unwilling to discuss this issue.
>
> If we are unable to reach an arrangement which brings our [labor] cost at Albert Lea in line with that at Jerome, [Respondent] has the right to proceed to relocate work based on economic considerations. This is not intended as a threat. It is a simple economic fact of life.
>
> I should also remind you that we are in a very seasonal business with its own unique production scheduling requirements. Consequently we [cannot] let this issue drag on. There will come a point where we must decide where to begin producing our fall requirements.
>
> This should substantially clarify our position. If you have further questions, feel free to call. You have my work and home numbers.

As to his reasons for having sent that letter, Adams testified that, from "feedback" from Respondent's negotiators, he had concluded that the Union's negotiators "really didn't understand the context of what we were doing and were misinterpreting it and that it was hurting the negotiating process." In consequence, he testified that he prepared and sent the July 3 letter:

> To try and clarify as articulately as possible and document the clarification of our position on the Jerome facility. It was our understanding that we were fulfilling our obligation to negotiate the effects of a pre-existing plan and not a campaign of intimidation for us to attempt to utilize a facility that we owned and wasn't being utilized well.

Kodluboy agreed that, as presented, there had been no factual misrepresentations in the July 3 letter. Significantly, Adams's explanation in it is consistent with Respondent's evidence regarding the July production increase at Jerome, although its message might have been more clearly expressed—to better convey the distinction between the 50-percent capacity increase and increases beyond that capacity level at Jerome. Still, Adams testified that a decision concerning production at Jerome beyond the 50-percent capacity level "was an economic decision and based on the disparity in labor content in the Albert Lea production mode versus the Jerome production mode. So, by changing the labor economics at Albert Lea, that would change the decision." In other words, Respondent was willing to bargain about labor cost reductions to avoid work relocation to Jerome, to take advantage of that facility's unused 50 percent of total capacity.

As a second step to prepare for the July 5 session, Adams prepared a revised counterproposal. For purposes of understanding changes in this and succeeding counterproposals, the revised one is Respondent's Exhibit 11. On it appear what Adams described as "Microsoft Word revision marks," showing changes from previous documents. These marks allow a reviewer to discern more readily which provisions have been changed and the substance of revisions.

There is no contention that a copy of Respondent's Exhibit 11 had not been the document submitted to the Union on July 5. At the top of the first page, it shows a preparation date of "07/03/94." Adams testified that the revision had been made "to accommodate concerns that had been brought back that the [U]nion negotiators had raised relative to our agreement [sic]."

The recognition portion of article 1 was changed by adding "and regular part-time" and "as specified in NLRB Case 18–RC–15576 dated 6 May 1994," so that by July 5 it read:

> [A]ll hourly, full time *and regular part-time* production and maintenance employees employed by the Company at it's [sic] Albert Lea, MN facility; excluding office clerical employees, confidential employees, professional employees, managerial employees, supervisors, guards, and technical employees, *as specified in NLRB Case 18–RC–15576 dated 6 May 1994.*

Of course, that last phrase had been suggested by the Union, as set forth in subsection M, on June 30. Certain other changes were made, as well.

To "*Savings and Separability Clause,*" article 3, was added a provision for discussion with the Union before making any changes to the contract as a result of conflict with Federal or State laws. To the portion of article 5 pertaining to job openings, the posting period was raised from the originally proposed 48 hours, to 72 hours. In article 6, the word "paid" was added before "breaks" and "lunch period," to show that employees would be paid during those periods. To "*Shop Rules,*" counterproposed in article 15, was added a provision for 1 week's notice to the Union of "significant changes" where there is no urgency. An entirely new article—article 18-Leaves—was added to allow unpaid leave for "legally mandated causes," as well as for funeral leave.

Kodluboy agreed that the language in article 1 had been added because of concerns raised by the Union about adding "technical employees" to the bargaining unit's exclusions. He also agreed that the article 3 change increased the Union's involvement and input into situations covered by that article; that the article 5 language changed the posting period length, to which the Union had objected on June 30 as being too short; and, that the Union had wanted article 6 clarified to show that breaks and lunches would be paid.

As to the newly added article 18, Kodluboy testified, "I can't recall" leaves from work "coming up" on June 30. He eventually did admit, however, that article 18 did include "something that the [U]nion wanted to see in a contract" and that it had been inserted "in reaction to" the Union's concern about leaves. Of course, these changes did not constitute monumental ones. Still, the fact that Respondent had been willing to make them, of itself, does tend to show a willingness by Respondent to consider the Union's bargaining positions and to make changes sought by the Union. As will be seen in succeeding subsections, Respondent also was willing to make additional changes in its counterproposals.

From an overall perspective, the July negotiating session opened with submission to the Union of Adams's July 3 letter and revised counterproposal; followed by another refusal to discuss economics by the Union, which took the position that it wanted to first resolve language issues; followed by a review of contract proposals; followed by a caucus of the Union's representatives; followed by Kodluboy's announcements that unfair labor practice charges had been filed, that he no longer wanted to continue that day's session and that the Union would not meet with Respondent on July 12; and, finally, by a tentative agreement to next meet on July 19. To the extent relevant, the following testimony was provided in connection with those general areas.

Both Nellis and Kodluboy testified that when the session had commenced, apparently in connection with production of the July 3 letter, Drake mentioned that Respondent might start relocating operations to Jerome. Thus, Nellis testified, "I believe Ron Drake made a statement at the beginning that we needed to get things going or they were going to move to Jerome, Idaho." Kodluboy initially testified, "[T]his meeting here again on—as with the prior meetings we had discussions that we have to get into the economic package or we're going to have to relocating [sic] work into Jerome, Idaho." But, he then testified that Drake "said words to the effect that if we don't get competitive that we're going to have to think about relocating work to Jerome, Idaho."

Whichever Drake said precisely, Kodluboy testified that his words were "like having a shotgun to your head and trying to negotiate. At that time I had to get my thought process together and I called for a caucus." However, Kodluboy admitted, at one point, that that had not been the exact sequence of events—that negotiations had taken place before he had called for a

caucus. Nevertheless, when his attention again was focused on Drake's opening remarks about Jerome, Kodluboy maintained, "I believe the [U]nion was put into a position like they had a shotgun at their head and it's hard to negotiate that way."[16] And he continued to assert, "It was a result of the threat again to move to Jerome, Idaho" that he had caucused and come back to say that the Union was filing the charge. In so testifying, it appeared that Kodluboy had been trying to feign a situation that would serve to lay blame on Respondent for the negotiation breakdown which occurred later that same day.

As to Jerome, Kodluboy testified that neither at the July 5 meeting nor later did Respondent provide information as to which particular work Respondent might relocate there, nor was any information provided as to how many employees might be affected by such a relocation: "They were just general statements," he testified. As pointed out above, however, there is no particularized evidence that any Albert Lea work, in fact, had been relocated to Jerome during and after the summer of 1994.

As to the question of negotiating economics, Nellis testified that he had nothing in his notes showing the Respondent had asked to discuss economic issues on July 5, and he did not remember such a request by Respondent's representatives during that session. However, Kodluboy acknowledged that there had been such a request, but that he "was trying to get the language done" first, consistent with "my preference" to discuss language before discussing economics.

Once the parties began discussing contract issues, testified Nellis, "We asked what the word 'technical' meant," but Drake "responded . . . he still doesn't know" and Kodluboy "said that he wanted a description of the unit as the NLRB had certified," to which Drake made no response. Kodluboy gave no testimony about a discussion of the counterproposed "technical employees" exclusion. Nor do his notes make any mention of that subject. Of course, as quoted above, Respondent already had added the unit language, in the revised counterproposal, that Nellis claimed that Kodluboy "wanted."

In that respect, VanKampen's notes recites only, "Point 1.02 Wants the word '*TECHNICAL*' removed[.]" However, he testified that he had not written down in his notes what, in fact, he had explained to the Union's representatives during the July 5 negotiating session:

> [W]e wanted to exclude the word "technical" because to us that referred to our polymer chemist, Bob Renaux. The union apparently wanted to keep the word "technical" in there because they were referring to that as the extrude[r] technician, the twisting techs and boxing techs.

That is, he testified, Respondent wanted to exclude chemists, as well as, "People like a polymer engineer which we currently had on staff or were going to have on staff."

According to VanKampen's notes, there was some discussion of the management rights, article 2, counterproposal, which the Union said was unacceptable, after which the Union caucused. When he returned from that caucus, Kodluboy accused Respondent's officials of bargaining in bad faith, said that he had filed an unfair labor practice charge, gave them a copy of the charge and canceled the July 12 negotiating session. But, it is not altogether clear from the notes why Kodluboy had taken those actions.

Nellis testified that Kodluboy had said, on July 5, "that he believed that the negotiations had been tainted by the threat of the loss of our employment at the beginning of the meeting[.]" In effect, that also was Kodluboy's initial testimony. For, as set forth above, he testified that after Drake had said Respondent was "going to have to think about relocating work to Jerome," he felt a "shotgun" was being held to his head and, "At that time I had to get my thought process together and I called for a caucus." When he returned from that caucus, Kodluboy testified, "I informed them that in the previous week" he had filed his charge. Since that charge already had been prepared and mailed to the Regional Office by July 5, however, it can hardly be maintained with persuasion that its filing had resulted from anything said, nor from any document produced, during the July 5 negotiating session. That is, the charge could not have resulted from anything said by Drake, during that session, concerning Jerome. Further, as set forth above, Kodluboy acknowledged at one point that negotiations had preceded the caucus.

Neither Kodluboy nor Nellis described what had been said during the caucus. Both admitted that, after his accusations of bad-faith bargaining and production of the charge, Kodluboy had said that he wanted a hiatus in negotiations. He testified that he had told Respondent's representatives, "I think we should give the Board a chance to investigate these allegations." Nellis corroborated that testimony by Kodluboy. Still, neither man explained why, since Kodluboy testified that he had mailed the charge to the Region before July 5, the Union had even seen fit to meet with Respondent on that date. If Kodluboy truly had believed that a negotiating hiatus should occur, to "give the Board a chance to investigate these allegations," surely there would have been no point to meeting at all on July 5.

Nellis was asked if the charge had been filed to put pressure on Respondent. He answered negatively, asserting that the charge had been filed "because of failure to negotiate" and to "cause them to negotiate," but not to compel Respondent to concede to the Union's proposals. Still, the filing of it was utilized by Kodluboy as the basis for terminating the July 5 negotiating session and, moreover, for canceling the session scheduled for July 12. And, Kodluboy never explained with particularity what he had believed that such an interruption of negotiations would accomplish. Of course, it would serve to further string out the negotiations, but not too obviously so.

"Substantial wage increases" had remained the Union's wage proposal through the July 5 negotiating session. In his view, testified Adams, "There wasn't any progress" on negotiation of economics. Moreover, he testified, through that negotiating session, "we hadn't been able to engage in any substantive discussion of the issue of allocating production between the Jerome and Albert Lea facilities," and, in fact, the Union had displayed no willingness "to make any changes" in its June 15 proposal.

In consequence, Adams testified that he decided to send another letter to Kodluboy, "to get some proposal on the table" concerning economics. It is dated July 11, 1994. Its text states:

> We notified you at our last meeting that we expect a substantive discussion of economic issues at our next meeting. Specifically, we expect to receive any options you might wish to present that would impact the com-

[16] Kodluboy is no novice as a negotiator. He testified that "probably the first" contracts he had negotiated had been during 1986 or 1987 and, "When I really got heavily into it was after 1990."

> pany's desire to relocate work to our Idaho facility and to contract out general [labor] functions at Albert Lea.
>
> As you should be aware, [Respondent] would realize considerable economic advantage from relocating or contracting out work under the current compensation package at Albert Lea. Management made the decision to pursue these options some time ago, subject only to discussions with our employees. As our business is seasonal in nature, these are timely issues to our contract discussions. And we feel that you are obligated to place any viable proposals you may have on the table at this time.
>
> We look forward to discussing your proposal with you at our next scheduled meeting on 19 July 1994.

As to the letter's reference to "contracting out work" Adams testified:

> [W]e had an obligation on issues of contracting out any work at Albert Lea to give the union an opportunity to negotiate on this issue and change the economic attractiveness of doing that. We had some very attractive opportunities to potentially contract out portions of the work at Albert Lea because our cost for the routine types of work were so high. So packaging, you know, $14.00 an hour employees is not too hard to find options of ways to contract that out at a considerably lower cost.

Kodluboy acknowledged having received Adams's July 11 letter before the July 19 negotiating session. And he did prepare an "Economics Proposal." It is a one-page document, which, in pertinent part, states:

> *WAGES*: The Union has asked [Respondent] to open their books for an audit to determine their needs.
>
> [Respondent] has not answered as to whether they will or not.
>
> The Union, in an effort to cooperate with [Respondent], will:
>
> —OFFER a three (3) year wage freeze at their present levels.
>
> *BENEFITS*—Keep all benefits at their present levels (Medical-Life Insurance).
>
> Transfer [Respondent] 401K to USWA 401K.
>
> Money now allocated for 401K benefits to USWA Trust Fund.
>
> *HOLIDAYS*: Freeze as is.
>
> *VACATION*: Freeze as is.

Kodluboy explained that "this was our initial economics proposal" which "would go with the language" proposal of June 15, so that the above-quoted proposal "would complete the contract."

Questioned about the "Economics Proposal," Kodluboy agreed that it would not have brought down Respondent's wage rates to levels of Respondent's competitors nor, for that matter, "even anywhere close to" wages paid at Jerome. He also agreed that he had no evidence refuting Respondent's assertions that the Albert Lea wage level was so high that Respondent was losing market share. Still, he testified, he regarded the "freeze" proposals to be concessionary, because

> the current cost of living as taking place at this time has been running between 3.1 and 3.2 per cent for this area. And over a period of three years which the contract proposal would envision we could see decreases in the actual cost of between 8.4 to 9 per cent or possibly even higher, depending on where the inflation rate was.

That 8.4- to 9-percent decrease, testified Kodluboy, would be a "decrease in real buying power" of employees over the three-year term of a collective-bargaining contract. Furthermore, while he acknowledged anticipating that the "Economics Proposal" would not be acceptable to Respondent, he testified, "I expected a counter-proposal[.]" In other words, Kodluboy was pursuing the same course as Adams testified that he had followed in formulating his original counterproposal, as described in subsection M.

When the July 19 session began, Respondent again asked to discuss economics and Kodluboy asked to examine Respondent's books. Drake replied that Respondent would not agree to such an examination, saying, according to VanKampen's unchallenged testimony, "[W]e weren't declaring financial hardship. We weren't losing money so that was a nonissue. The issue was the rate of return."

It was then that the Union presented it's "Economics Proposal." Kodluboy testified, without contradiction, that after examining it, Drake said, "This is an inadequate proposal. It doesn't address reality," to which Kodluboy orally provided the same "cost-of-living" explanation quoted above. He further testified, without dispute, that he offered to discuss other solutions that would improve productivity and save money in ways other than decreasing wages. However, he conceded that he continued to adhere to the Union's proposals of June 15 and July 19: that supervisors not perform unit work, that unit work not be contracted out, that temporary workers not be retained to perform unit work, and that economics be frozen.

The parties went through the Union's proposal. As they did so, according to VanKampen's notes, Kodluboy "asked many times whether [the Union's] proposal was dead." Then, they began going through Respondent's revised counterproposal, but had to adjourn due to pain being suffered by Production Manager Johnson. They agreed to meet next on August 1.

Nellis had come late for this meeting—"At the very end," he testified, when "I believe the discussion had pretty much been done by then." Nonetheless, he testified that he had heard Kodluboy ask Drake "if our proposal was dead," and had heard Drake reply first, "Yes," but later, "No."

Given Nellis' testimony, it is clear that Kodluboy had asked whether the Union's proposals were "dead," at least once during this negotiating session. Under any circumstances, that is an unusual question for a bargaining representative to ask, during only a fourth negotiating session when its own economic proposal had just been presented to the employer and before negotiations about it had even begun to develop.

In the circumstances here, Kodluboy's question appeared to be an effort to trap Respondent's officials into an improvident reply. Based upon past communications, and as he had admitted above, he readily could have anticipated that the "Economics Proposal" would not be viewed favorably by Respondent's negotiators. It should have been obvious, as an objective matter, that further negotiations concerning economics would be occurring. While Drake expressed the opinion that the "Economics Proposal" was "inadequate," neither he nor any of Respondent's other negotiators expressed any intention not to negotiate on the basis of that proposal. Moreover, not only had the parties been negotiating about "language" proposals, but Respondent already had made some concessions in its counterproposal, albeit not major ones.

In that context, a party's question about whether its proposals are "dead" simply makes no sense. Kodluboy did not explain his reason(s) for having asked it. Absent an explanation, it seems a fair inference that he was seeking an answer upon which the Union could seize as a basis for charging Respondent with unlawful bargaining. Even though Drake may have provided such a reply initially, Nellis's above-quoted testimony shows that, by meeting's end, Respondent's position had been that the Union's proposals were not "dead."

Following that meeting, Adams reviewed the "Economics Proposal" and, he testified, concluded that it

> actually created a far less desirable set of operating parameters for the Albert Lea plant, would actually leave us in a worse economic circumstance than we were in going into negotiation so it would actually make—it makes Jerome relatively more attractive than it was previous to beginning the contract negotiations.

So, he prepared another letter to Kodluboy.

> That letter is dated July 20, 1994. Its text states, to the extent pertinent:
>
> I have reviewed the economic proposal that you submitted to our negotiators at the 19 July 1994 meeting and feel that we need to clarify our position once again.
>
> First, our negotiators feel that they have clearly indicated that [Respondent] will not open its books to the Union. We feel that [Respondent] has full discretion to set the financial objectives for its operations. And we do not feel that we are obligated to bargain with the Union as to what our financial objectives should be. Our position is that [Respondent] should be earning higher returns, and in fact would be earning higher returns, if we were to implement our plans to transfer and contract out work.
>
> Second, we compete with nonunion facilities with wage rates of less than $9.00 per hour. We also have the ability to produce twine with competitive labour rates by relocating work to Jerome or by contracting out unskilled work at Albert Lea. Therefore, we must consider any proposal that fails to substantially move our labour costs in that direction while preserving management's flexibility to run our operations as cost effectively as possible, to be nonresponsive.

O. Events During August and September 1994

Although the parties again met on August 1, it is somewhat of a misnomer to apply the adjective "negotiating" to the session which occurred that day. Most of it was spent with argument and counterargument, accusation and counter-accusation, threat and counter threat. Federal Mediator Dan Bryant was present for the first time during these negotiations. After he met separately with each side's representatives, he brought the parties together.

Adams, who was attending a negotiating session for the first time, mentioned that the Union had not submitted a truly concessionary proposal about economics. Kodluboy replied that he had done so on July 19. Adams replied that the "Economics Proposal" was not a "realistic economic proposal," that Respondent paid $6.75 an hour in Jerome, and that Respondent could contract out work in Albert Lea to another company in that same city for $7 an hour. Kodluboy protested that the Union had offered a freeze. It also was willing, he said, to take over pension and health administration, so that Respondent would no longer have to incur those costs.

According to VanKampen's notes, Adams said, "Our attorneys have copies of our plan to contract out labor and move production to Jerome. The [U]nion is here because we notified the employees of our intentions." Kodluboy retorted that he felt threatened by references to Jerome and had filed charges about Respondent's failure to recall restricted employees, adding, according to VanKampen's notes, "Most people cannot accept taking a 15% cut without [Respondent] opening its books to justify it. We feel a freeze is a concession." Adams replied that it was simply a fact that Respondent had a more economical facility than the one in Albert Lea.

Eventually, an effort was made to try negotiating. Kodluboy renewed his questioning as to whether the union proposals were "dead," and may have put those questions to Adams more than once. Ultimately, Adams did answer affirmatively. Kodluboy said, "I don't know where to go," in light of Adams's affirmative answer, and called a caucus of the Union's negotiators. VanKampen's notes state that, during that caucus, Mediator Bryant told Adams that "the Union said that if their contract was dead then there is no need to continue negotiating."

Adams testified that he became concerned that negotiations were getting "hung up on terminology and posturing," when the parties were supposed to be negotiating a contract. So, when the Union's representatives returned, and Kodluboy protested that he felt the Union was not being treated fairly, inasmuch as Adams had rejected both its June 15 and July 19 proposals, Adams said that he did not "want to be hung up on semantics," referring to the word "dead." Pointing out that the Union's proposals were not close to what Respondent felt would be acceptable, Adams offered to meld the proposals and counterproposals into a single document, from which negotiations could be conducted.

Adams continued by saying that Respondent was "considering contracting out" and asked if the Union had anything that would "respond to our needs." Kodluboy answered that he did not know where he was at, given Respondent's rejection of the Union's proposals. When Adams said that Respondent wanted to discuss its intention of relocating to Jerome and contracting out work, and asked if the Union wanted "to compete"—presumably through economic concessions—with the economics Respondent would achieve by relocating and contracting out work, Kodluboy asserted that the Union would "not knuckle under to blackmail." When Adams said Respondent would contract out work if the Union had no counterproposal, Kodluboy said the Union was owed a counterproposal by Respondent. VanKampen's notes recite that Adams said, "You either meet our proposal or we have a right to move to Jerome."

The two men continued squabbling over whose turn it was to make a new proposal. Everyone, who was asked about the matter, testified that the session became a heated one. Bryant finally said nothing could be gained by continuing it. He adjourned the parties, saying he would call for another session "when I think the time is appropriate."

As August passed and nothing further was heard from Bryant, Adams decided to try restarting negotiations. He sent a letter to Kodluboy, dated August 25, 1994, the text of which states, to the extent relevant to the complaint's allegations:

> It has now been over three weeks since that [last negotiating] meeting. We in management have a business to run and the seasonal nature of that business will make certain

> management actions necessary in the near future. Therefore I feel that it is unreasonable to needlessly postpone the negotiating process further. I am requesting that you review your position regarding negotiations and agree to schedule further sessions as soon as possible. There is nothing in the NLRB's process which precludes us from continuing our efforts to reach an agreement while any charges are being handled.

Kodluboy responded, by letter dated August 26, 1994, stating that it had been the mediator who had adjourned the last bargaining session, to allow for "a cooling off period," and the mediator had "stated he would be back in contact with both of us." The letter continues:

> Remember also that you were the person who rejected both our language and concessionary economic proposal. You stated that my proposals were dead. Sir, I believe you should re-think your position and, in the meantime, I will attempt to work with Federal Mediation on the matter of negotiations.

Adams responded by letter dated August 29, 1994. In it, he offered to meet to continue negotiations "this week," if the Union was prepared to do so. His letter continues:

> Assuming that you are prepared to meet, I again encourage you to bring with you any proposals which you feel would affect our decisions relative to contracting out and the relocation of production from Albert Lea to Jerome. I remind you that it is our position that your offer of a wage freeze does nothing to eliminate the huge economic advantage of implementing the changes we plan and therefore is nonresponsive to our request for a viable alternative.
>
> As far as the overall contract issues are concerned, I continue to feel that our last proposal represents the most promising basis for further discussions. First, it is the latest and most complete proposal on the table. Second, as I have noted before, your proposal fails to meet in any way the economic and operating concerns of the company. We are prepared to review our proposal with you paragraph by paragraph and discuss alternative language to any section of it if you see alternative ways to meet the needs of the business. We are prepared to meet with no preconditions as to the position of either party entering the meeting.

The Union did not respond to this letter.

By letter dated September 2, 1994, Adams gave notice to Kodluboy that, "Lacking a timely response to my fax letter of Monday, 29 August, requesting the resumption of negotiations, I am writing to notify you that [Respondent] intends to proceed with it's [sic] plans to contract out work at Albert Lea and to begin further work relocation to Jerome, ID." In the letter, Adams described what he regarded as the Union's unwillingness since early June to discuss the issue of contracting out work and relocation of work to Jerome.

Despite Adams's assertions in his letter, there is no evidence that during August Respondent relocated any production work to Jerome. However, it did add to the complement of outside labor already working at the Albert Lea facility. As described in subsection K, clients from Cedar Valley Services had been working there, for sometimes increasing periods of time, since the beginning of 1994. But, during September Respondent turned to a different outside labor supplier: Express Temporary Services (Express).

Respondent had regularly obtained temporary labor from Express between October 3, 1989, and February 27, 1992. After that, there is no evidence that any temporary labor had been obtained by Respondent from Express until the week ending September 11, 1994. At least, the parties stipulated that, prior to that week, Respondent had not obtained workers from Express during 1994.

During the week ending September 11, Respondent obtained three workers from Express. They worked a total of 95 hours at the Albert Lea facility. During succeeding weeks, Respondent continued to utilize Express personnel, in increasing numbers and for an increasing number of hours: 5 worker for 134 total hours during the week ending September 18; 8 workers for 257.25 total hours during the week ending September 25; 11 workers for a total of 309 hours during the week ending October 2; 9 workers for a total of 306 hours during the week ending October 9; 10 workers for a total of 324 hours during the week ending October 16; and 10 workers for a total of 333 hours during the week ending October 23.

During the following weeks and through mid-1995, similar number of workers from Express continued to work a substantial total number of hours at Respondent's Albert Lea facility. It is undisputed that they were doing the same types of work as employees in the unit for which the Union was the bargaining agent.

The final employee who had been laid off during the spring was not recalled to work until October 17. As of the week ending September 11, when Express personnel initially began working at the Albert Lea facility, approximately 17 of those previously laid-off employees were still awaiting recall. Respondent never did explain with any particularity why it had chosen to retain workers from Express, rather than recalling any of those still laid-off employees. Nevertheless, during succeeding weeks, while Express continued supplying workers to perform an increasing amount of Respondent's work, Respondent did continue recalling employees laid off during the spring.

The General Counsel alleges that Respondent violated Section 8(a)(5), (3), and (1) of the Act by retaining Express personnel to perform unit work during and after September 1994. At first blush, there might appear to be merit to the argument that Respondent had done so to compel the Union to accede to Respondent's bargaining demands, especially given some of Adams's above-quoted statements during the August 1 negotiating session, as well as in the above-quoted August 29 letter. A second look, however, dispels whatever facial merit that argument possesses.

To be sure, Adams spoke about contracting out work in the context of objecting to the Union's wage-freeze proposal and of trying to persuade the Union of the need for wage concessions. Yet, Respondent had long contemplated contracting out at least some Albert Lea production work if it could not obtain relief from what it regarded as high labor costs at that facility. Thus, to correct the adverse competitive position indisputably arising from those high labor costs, Attorney Ohly testified that, as early as October 1993, as described in subsection I, Adams had desired "to go back to contracting out some of the work," apparently referring to the above-described 1989 to 1992 utilization of Express personnel at Albert Lea.

Further, in the comparative capability profile prepared in January 1994, described in subsection H, temporary personnel provided by outside suppliers was planned as one source for staffing the Albert Lea facility during the layoffs also contemplated in that document. In consequence, there is no basis for concluding that retention of personnel, such as that eventually provided by Express, had been a course suddenly thought of by Adams when he encountered heavy going during negotiations with Kodluboy. To the contrary, those events show that contracting out had been an alternative course decided upon by Respondent, if economic concessions could not be attained at Albert Lea, even before the Union appeared on the scene there, just as work relocation to Jerome had been such a planned alternative.

Moreover, just as there was no impropriety to the latter, as explained in subsection H, so also an employer is entitled under the Act to contemplate subcontracting or contracting for temporary labor if wage concessions are not agreeable to a bargaining agent. That employer's obligation under the Act is to give notice of its intentions to the bargaining agent and, then, allow the latter to negotiate about the subject, before any implementation, and to make whatever changes or modifications to that alternative course which negotiations might warrant.

Adams did attempt to comply with that obligation, from June through early September, before bringing Express personnel into the Albert Lea facility. Thus, as it became increasingly plain that the Union was unwilling to bargain about "economics," the factor which would directly influence Respondent's decisions about using contract labor, Adams began pointing out that with Respondent's primary selling season approaching, it needed to resolve the labor cost situation, so that it could implement alternative measures if agreement upon concessions was not possible.

In the portion of his July 11 letter quoted in subsection N, Adams pointed out that negotiation of economic issues was needed because of its effects on, inter alia, Respondent's desire "to contract out general labour functions at Albert Lea" if reductions could not be negotiated. As described in subsection O, during the August 1 negotiating session, Adams asked if the Union could offer any economic proposal to "respond to our needs," in view of the fact that Respondent was "considering contracting out" and wanted to discuss that situation. But, Kodluboy claimed that such a discussion would be submitting to "blackmail." As set forth above, in his September 2 letter, Adams gave the Union specific notice that, absent negotiations concerning the subject, Respondent "intended to proceed with [its] plan to contract out work at Albert Lea," but the Union never offered to bargain about that subject.

Even though Adams had become perturbed by that point at the Union's seeming intransigence concerning discussion of economics, it cannot be concluded that his perturbation, of itself, had motivated Respondent's resumption of using Express personnel. Even before the Union appeared on the Albert Lea scene, Respondent had utilized that firm's personnel at Albert Lea and, further, had planned use of contract labor as one corrective measure for high wage rates which, it is not controverted, exceeded those of its competitors. The Union was informed about Respondent's plans to use temporary help. Respondent offered to bargain about it. The Union did not want to do so. Thus, Respondent gave notice that it would implement its longstanding plan to utilize contract labor, absent bargaining about the subject. The Union made no response to that notice. Neither animus nor unlawful motive is revealed by these facts.

No doubt, the prospect of work relocation or contracting out of unit work imposes an added burden on bargaining agents' discretion. Still, that is the type of burden which is a reality of labor relations. Nothing in the Act relieves bargaining agents of such a burden during collective bargaining.

Therefore, I conclude that, having satisfied its statutory obligation to give notice and offer to bargain about a long-contemplated plan to contract out Albert Lea production work, if relief from noncompetitive labor costs could not be achieved through negotiations, Respondent did not violate Section 8(a)(3) of the Act by implementing its longstanding plan to secure temporary labor. Nor, given its ongoing offers to bargain about that subject and the Union's unwillingness to do so, did Respondent violate Section 8(a)(5) of the Act by doing so. I shall recommend that these allegations be dismissed.

Copies of the August–September correspondence between Adams and Kodluboy had been served upon Mediator Bryant. Ultimately, he contacted them to arrange for a resumption in negotiations. As it turned out, Kodluboy was unavailable to negotiate before September 29, 1994.

Adams was scheduled to attend meetings with Bridon Group in England on and after that date. Nevertheless, he agreed that representatives of Respondent would meet on that date with the Union. However, he did not allow the situation to pass without protest. In a letter to Bryant dated September 14, 1994, copy to Kodluboy, Adams expressed "considerable disappointment" that the Union could not meet sooner, pointing out, "We can only imagine what the attitude of the NLRB would be if [Respondent] made itself similarly unavailable." Moreover, he added, "[W]e are unable to persuade ourselves that the [Union] is not still using dilatory tactics to avoid bargaining."

Once the September 29 negotiating session was scheduled, testified Adams, "[W]e wanted to get started and actually get progress moving as quickly as possible because we had a big opportunity lost to not getting done." More specifically, he testified that "to get the negotiations moving and hopefully quickly we wanted to make a substantial move on some things that we hoped the Union would take as a substantial move." At the same time, Adams explained, he did not want that "move" to "cost me a lot of money right up front because we hadn't really been able to get into the economics substance yet[.]" Consequently, he further testified, by proceeding in the way that he planned, "we were looking for a substantial move in return. Hopefully one of economics but actually a substantial move in any area of the contract proposal."

By letter to Kodluboy, dated September 23, 1994, Adams stated, in pertinent part:

> In order to facilitate the progress of negotiations, [Respondent] will make two changes to the proposal it has on the table. First, it will agree to implement a dues check off. Second, it will agree to create a "Union Shop." We hope these proposals go a considerable way toward moving the negotiating process along.

In that letter, Adams also made points concerning certain other subjects:

> As always, our team will be prepared to discuss all aspects of our proposal. And, as I have noted in previous correspondence, we remain open to your proposals for alternative language to any portion of our document. I un-

> derstand that you indicated to the Board that you received the impression that some items in our proposal are nonnegotiable. Although my statements to you during bargaining and in my correspondence show that quite the opposite is true. [sic] I want to take this opportunity to make [Respondent]'s position absolutely clear: Everything is negotiable.
>
> . . . .
>
> I should also note that while [Respondent] has implemented the use of outside contractors, as per my letter of 2 September 1994 and in accordance with its long standing [sic] plan, we have made no irrevocable commitments.
>
> Therefore, this issue, along with the allocation of production between our facilities, within practical limits, remains on the table.

Adams denied that his willingness to grant the union-security and checkoff concessions had been motivated by notice from the Regional Office that those items would become subjects of any complaint which issued in Case 18–CA–13178. Rather, he testified, as quoted above, that his only purpose had been to jump-start negotiations.

As to the checkoff, he testified more specifically that Respondent had changed payroll systems, by going to a commercial payroll service, rather than continuing to use its own computer system. The commercial system could accommodate a larger number of deductions, according to Adams, than could Respondent's own system. Thus, there could no longer be an objection based upon the formerly limited number of deductions that Respondent could accommodate for payroll. As to the union-security concession, Adams testified, "[W]e thought [it] was a 'mom and apple pie"' issue for the Union—in effect, one which would cause the Union to be more receptive to issues of concern to Respondent.

Replacing Bryant as mediator on September 29 was Alan Langohr. Kodluboy, Nellis, McKane, and Campbell continued representing the Union; Drake, Johnson, and VanKampen also did so for Respondent. Before starting to review the proposal and revised counterproposal, several topics were discussed. When Drake mentioned Respondent's union-security and checkoff concessions, Kodluboy replied, "I don't call those concessions." Yet, Nellis acknowledged that those had been significant concessions: "[Y]es, it is something that, yeah, we should have, that is correct."

According to Nellis and to VanKampen's notes, Kodluboy said that the Union wanted to establish a good relationship with Respondent. Drake said that everything was negotiable. Kodluboy repeated that the Union would not agree to concessions unless Respondent opened its books.

Kodluboy testified that he had learned about Respondent's new evaluation system from the negotiating committee. At the September 29 session, he asked that copies of all evaluations be sent to the Union. VanKampen's notes recite that Johnson replied that those were "a personal item," and Kodluboy suggested, "If the individual gives us a release then [Respondent] could send them to the [U]nion." Kodluboy never disputed that account. He testified only that Respondent's representatives "said if the employee would agree to release it to us they could possibly give it to us," but that Kodluboy did not agree to that suggestion. VanKampen testified that, "We said if the individual would give us a release they could give their evaluation to their Union." As it turned out, the completed evaluations were not submitted by Respondent to the Union until early 1995.

Also discussed was Respondent's newly imposed requirement that employees produce a doctor's slip to be paid for sick leave. That is not alleged as an independent unfair labor practice. Still, it is significant as evidence of attitude in analyzing allegations that Respondent had made specified changes in employment terms without prior notice to the Union.

As set forth in subsection D, section 11.3 of the Agreement with the employee committee allowed Respondent to impose such a requirement. However, it is not disputed that Respondent had done so only infrequently before 1994. Concerned about possible accusations of favoritism, and of claims about inconsistent treatment, Adams had directed that all sick employees produce a doctor's certification of illness. The notes of the September 29 session show that Kodluboy had said, "Stay with current policy, but want to run it by our people."

There was another discussion of the "technical employees" exclusion issue. The parties agreed that union security, dues checkoff, and checkoff authorization language would be added to article 1 of Respondent's revised counterproposal. The Union agreed to Respondent's "No Strike-No Lockout" counterproposal and promised to present new proposals concerning a number of other articles.

P. Events During October and November 1994

Five negotiating sessions were conducted during these 2 months. During the October 12 session, Kodluboy requested a discussion of layoffs and Respondent's representatives said that all laid-off employees had been returned to work, save for two who had not contacted Respondent. The doctor's slip requirement was discussed, with the Union objecting to that requirement having been imposed by Respondent. The Union pointed out that such a requirement should be confined to "problem" employees, because it imposed the cost of a doctor's visit on employees.

The Union presented a revised proposal, combining noneconomic, and economic subjects. It proposed that wages, health and welfare, and pension plan be "frozen." The parties went through it, with tentative agreement reached on one relatively minor point.

A somewhat extensive discussion ensued concerning employee evaluations. The Union again requested copies of completed evaluations. VanKampen said that Respondent had no problem with supplying copies, but that Adams "will check with counsel on this," adding that Respondent welcomed Union "input" to the evaluation process. Kodluboy agreed with the suggestion that Respondent meet separately with the employee-negotiators to explain the evaluation process and to receive their observations about it.

The parties agreed to meet next on October 19. As Mediator Langohr would not be available during the week of October 24, following meetings were scheduled for November 1 and 11.

At the beginning of the October 19 session, Respondent presented a newly revised counterproposal. It proposed adding the word "salaried" before the "technical employees" exclusion, so that the unit description would read:

> all hourly, full time and regular part-time production and maintenance employees employed by the Company at it's [sic] Albert Lea, MN facility; excluding office clerical employees, confidential employees, professional employees, managerial employees, supervisors, guards, and sala-

> ried technical employees, as specified in NLRB Case 18–RC–15576 dated 6 May 1994.

Respondent's newly revised counterproposal also added union-security and checkoff provisions, modified two of the enumerated management rights in its original counterproposal, modified, and changed certain sections in the "Seniority, Job Bids, Layoff & Recall" article, revised some grievance sections, and added a new article (art. 19) covering safety equipment, as well as payment and allowances for it. Adams testified that these were "all things we felt that the Union wanted to see in our agreement" and, "We were attempting to accommodate their concerns in each of the areas that we modified to move closer to their position and then attempt to reach an agreement." None of the Union's negotiators disputed any aspect of that testimony by Adams.

Respondent also submitted a two-page "Review of Labor Economics." It showed a disparity between Respondent's wage scale, on the one hand, and those in the Albert Lea community and those of competitors, as well between Albert Lea and Jerome. Adams testified that he had prepared and submitted it to explain how Respondent "related to [its] labor costs and established for things that the owners of the business see, that we would look at as [a] reference point in determining whether the compensation pack[age] that we had at Albert Lea was realistic and reasonable."

The "Review" recites that, including only base wage, night-shift premium and overtime premium for a biweekly 80-hours pay period, Respondent's base wage is over "$14.00 per hour worked," whereas "the average wage in Freeborn County is somewhat below $10 per hour"; Respondent's largest competitor, Exxon, pays an average hourly wage of $8.97 per hour; the most senior extruder operators at National Poly Products in Mankato, Minnesota, earn $11 per hour, while the most experienced material handlers there earn $8.97 per hour; and, average base wage at Jerome is $7.82 per hour. The "Review" continues:

> All of these comparisons are actually made worse by the fact that [Respondent]'s benefit package is also more generous than most. And the cost of many benefits is directly correlated with the base wage. For example, the fully loaded hourly cost at Albert Lea is over $22.50/hour; while the fully loaded rate at Jerome is about $9.32. This is a $13.00 per hour disadvantage for Albert Lea or *over 140 percent*.

After submitting the "Review" to the Union's negotiators, Adams went through it with them, explaining that,

> Our problem is not that our—not necessarily that our highest wage rate does appear to be the highest wage rate in the community, it's that our lowest rate is also the highest wage rate in the community. That's the problem, the fact that we have a salary that is sufficient to attract very highly skilled people and we pay that salary to all of our people even those who have absolutely no special skills whatsoever.

Adams testified, without contradiction, that Kodluboy responded that Union policy was not to "give any concession in wage and benefits that they can't take any steps backward unless [Respondent] is actually losing money."

Kodluboy added, testified Adams, again without dispute, that Respondent "would have to open [its] books and demonstrate that [it was] losing money before he would consider discussing the concept of wage concessions," since that was the policy of the Union's international body. The session adjourned to allow the Union to more carefully review Respondent's newly revised counterproposal.

The three November negotiating sessions were largely spent reviewing proposals and counterproposals, with a number of tentative agreements being struck. For example, as a result of the negotiations on November 1, Respondent agreed to add a nondiscrimination provision to the managements rights preamble. Changes were agreed upon with respect to the "*Discipline or Discharge"* and "*Grievance Procedure*" articles.

At the November 11 negotiating session, Respondent agreed to drop some of the enumerated management rights from its counterproposal. Some language was dropped and other language was added to the *"Savings or Separability Clause*." Various other agreements were reached to modify other articles. Most of those changes, it is uncontested, were concessions by Respondent and they had the affect of moving the parties closer to overall agreement.

At the third November session, on November 18, the parties continued reviewing proposals and counterproposals. Respondent expressed reluctance to discuss funeral leave, or other matters with economic implications, until there were negotiations concerning wages, so that more precise costs for such contingent subjects could be ascertained.

In that connection, Adams presented an "Hourly Employment Costs" sheet, showing, he testified, "[T]he annual cost of maintaining an hourly employee at Albert Lea." Adams asserted that fringe benefit costs were a substantial part of the Albert Lea compensation package, that it was difficult to get people for more difficult jobs when all employees were paid an identical wage rate, that laying off supervisors would leave shifts unsupervised, and that any subcontracting would have to take account of keeping a "core work force that would be relatively secure." So far as the evidence discloses, the Union disputed none of these assertions.

Kodluboy pointed out that, "There are things we can do to lower costs without lowering wages." There is no evidence that any of Respondent's negotiators objected to exploring such possibilities.

After a caucus, Kodluboy renewed discussion of that topic, saying that, "We came up with an idea to save money on the insurance by using a P.P.O.," which would save $25 for single employees, $50 for families, and include a prescription card. However, it is undisputed that Kodluboy had prefaced that suggestion by restating the position that, "The Steelworkers don't give concessions without seeing a need by the company." As this discussion concluded, Adams asserted, it is uncontested, "Everything [is] negotiable. At the end of the day we must be able to meet the profitability that our owners expect of us."

When the parties adjourned, there was agreement to conduct the next negotiating session on November 28 in Albert Lea. That would allow Respondent to conduct Kodluboy on a tour of the facility there. It was agreed that Kodluboy would arrive before the negotiating session was scheduled to begin, so that Adams could conduct that tour. But, Kodluboy never appeared on November 28, neither for the tour nor for the negotiating session.

By the evening of November 28 southern Minnesota was experiencing a heavy snowstorm. Union bargaining committee member, McKane, testified that he received a telephone call

from Kodluboy that evening. The latter said, "[T]hat he would not be down for the tour but he would be there for negotiations," because "with the weather the way it was he wanted to travel during the light hours." Yet, it is undisputed that Kodluboy never gave similar notification to Respondent's officials, nor apparently to Mediator Langohr.

Adams testified that he left his Bloomington home at 5 a.m., so that he would be at the plant in time for the 7:30 a.m. tour. Once there, he learned, as a result of McKane's report, that Kodluboy would not be coming for the tour. After he arrived in Albert Lea that morning, Langohr also learned for the first time that Kodluboy had not come for the tour. Consistent with Kodluboy's message to McKane, Adams, and Langohr waited for Kodluboy to arrive for negotiations.

It is undisputed that, at approximately 11:45 that morning, Kodluboy telephoned Adams and, with Langohr listening on the speaker phone, claimed, "I got up at five o'clock this morning to come down for my tour, and don't you know I locked the keys in the car. I thought I had a spare set in my brief case, but it turned out they were for another car, so I didn't make it." Asked if he intended to come to Albert Lea for negotiations, it is uncontroverted that Kodluboy answered, "It's kind of late now, maybe we ought to just not do it today." Adams and Langohr left the matter rest, without making an issue of the inconsistency between what Kodluboy was telling them and what McKane had reported earlier that same morning.

Q. Events During December 1994

The next negotiating session was conducted on December 9, at Federal Mediation's St. Paul, Minnesota office. Following a caucus with the Union's negotiators, Langohr, submitted to Respondent's negotiators a newly revised proposal. In doing so, he explained that the union negotiators were "trying to put their best foot forward," and asked that Respondent's negotiators "give a positive response if you possibly can." Adams complained that it "would be easier if we had had this information ahead of time." Langohr agreed, but said there had not been "a dammed [sic] thing" 30 minutes earlier. Adams said that he would do the best he could, but would not "give a final assessment until we go back and really go through it in some detail."

The text of that newly revised proposal recites:

> Supervisors will not perform bargaining unit work except under the following conditions:
>
> - Research and Development.
> - Bonified Training.
> - Emergencies (Such as an Act of God.)
>
> No Bargaining Unit Employee is to be layed [sic] off when a temporary employee is in the plant.
>
> Use of temporary employees in other jobs will cause one days [sic] pay to be awarded to the low person on the O/T LIST.
>
> Job Classifications:
>
> - Maintenance
> - Production
> - General Laborer
>
> Temporary Employees—General Laborer
>
> Temps would be limited to the following duties.
>
> - Janitorial duties
> - Blowingoff [sic] Roblons and Simas
> - Boxing—Filling Boxes and Stacking off (One Bargaining Unit Employee must be in the area for Quality Control Reasons.)
> - Picking up centers
> - Pick up scrap barrels
> - Bailing [sic] scrap
> - Sweeping
>
> The extrusion area is off limits!
>
> Wage Scales
>
> Maintenance Person—$13.12
> Production Person—$13.12
> General Laborers (TEMPS)—
> Wage as per last agreement with employees.
> Shift Differential—40 CENTS 6pm to 6am.
> Probationary Period—6 Months
> Progression—3 Years with a 50 CENT increase
> every 6 Months.
> Union Dues to be deducted 30 days after hire.
> Vacation as per last agreement.
> Insurance U.S.W.A. PPO (TALK) or as is.
> Sick Pay as per last agreement.
> Life Insurance as per last agreement.
> LTD as per last agreement.
> Holidays as per last agreement plus Xmas Eve.
> 401K as per last agreement/or Steelworkers Pension
> or U.S.WA. 401K
> Leave of Absence as proposed.
> Breaks & Lunch break as proposed.

Adams testified that cursory review seemed to disclose that the newly revised proposal was more restrictive than the Union's prior proposals. Certainly, it proposed no reductions. During direct examination Nellis claimed that Adams had said the Union's proposal "wasn't worth anything." Yet, during cross-examination he contradicted himself, conceding that Adams had "said that there were some things in this proposal that he could recognize and that probably would work" and, also, "that he might consider something, some of it." Johnson's unchallenged notes of this session show that Adams had said, "We need to analyze" the newly revised proposal and, "There are some things. We can possibly use those concepts. We are not opposed to probably have [sic] no temps in when bargaining unit employees are on lay-off. But, we are looking for job classes with pay differences."

In the end, it was Mediator Langohr who adjourned the session. According to Johnson's notes, Langohr suggested that Adams, "React a little bit today" to the Union's newly revised proposal; "Say it is not what we expected and we will come back with something next time."

Following this session, Adams more thoroughly reviewed the newly revised proposal, prepared a latest revised counterproposal and transmitted it to Kodluboy by letter dated December 11, 1994. In that letter, Adams states, in pertinent part:

> On the purely economic issues covered, we don't see any changes from your last proposal. In addition, restrictions are proposed on the use of temporary and salaried employees which do not exist today, making this proposal more costly to [Respondent] overall than our existing agreement.
>
> Regarding the noneconomic elements of the proposal, we understand from further discussion that your separate

notation of Maintenance and Production, but with the same wage, under wage scales was meant to imply your recognition of separate seniority pools for these areas. In an attempt to get something moving in the area of economics, we will take this as being some progress; and in response will show an amendment to the wage scale for Job Class 1 across the board, and to the junior rates of Job Class 1, in our next updated contract proposal.

As we get deeper into the very substantive and therefore challenging area of economics, I would like to offer some clarification of [Respondent]'s economic position; and then a new and very focused proposal that directly addresses some specific economic items that may help break the ice in this area.

We have pointed out in our economic presentations so far that there are several areas of our existing compensation package that [Respondent] feels are unrealistic. Most significant among these is that there is a single wage rate for all hourly plant workers after the training period. This is unique in my experience for manufacturing facilities similar to ours; and while I am familiar with numerous USWA contracts, I have never personally seen one with less than six pay grades. It is difficult for me to see how we can make real progress in this area without a recognition on the Union's part that the single wage rate concept eliminates most constructive opportunities for compromise; and that six to seven grades is likely a practical minimum for our facility. I would encourage you to revisit your position on this critical issue as soon as possible.

Some of the other areas where we have particular problems with the existing package include: the amount of paid time off including "sick days," the size of the shift differential, the payment of 6 hours of overtime for weeks the employee works only 36 hours, and the length and number of paid breaks. Here again, the number of paid sick days (seven as opposed to none in most contracts) and the length of paid breaks are unique in my experience with the USWA. I have not seen such onerous demands for these particular benefits in any USWA contract with which I am familiar.

All of these appear to be promising and in some cases necessary areas to achieve progress before we can seriously tackle the more complex and sensitive issue of the base wage scale. Therefore, in an attempt to get started on these issues, [Respondent] will provide specific proposed compromises to address some of these areas. The form this takes is that we propose that you accept a specific Article or section from [Respondent]'s current contract proposal. In return, we would offer to improve our current offer in some other benefit area. I earnestly believe if we can get a couple of these issues traded off we will create considerable momentum towards settling several more. Our initial suggestions are the following:

Item 1: We propose that you accept [Respondent]'s Article 13 on sick pay. In return [Respondent] would improve it's vacation proposal as follows:

Article 12.03 Change vacation allowance at one year of continuous service from 24 to 36 hours; and add an additional 12 hours at two years continuous service.

Article 12.04 Change vacation allowance at five years from 40 hours to 72 hours, and add an additional 36 hours at ten years continuous service.

Item 2: We propose that you accept [Respondent]'s proposal for a shift differential of 10¢ per hour. In return, [Respondent] will add Easter to the proposed list of paid holidays.

With respect to his purpose for having floated these two proposals, Adams testified:

> I think the particular things we were looking at here was [sic] we were agreeing that if parts of this contract were accepted then we would improve vacation, if other parts of [were] accepted we would have improved holidays and suggesting that of the remaining nonwage economic items we'd like to try trading the rest of them off in pairs in sort of the same fashion.

As to the latest revised counterproposal which accompanied the letter, Adams testified that he intended to "see if we can find a couple of small [economic] areas" as to which agreement could be reached and, concomitantly, form a basis for proceeding to discussion and possible agreement in other areas. He also testified that "it was not our final proposal by any strength of the imagination," but "was a negotiating position."

A comparison of December's latest revised counterproposal, with Respondent's original June counterproposal, described in subsection M, shows that, as a result of negotiations during the interim, Respondent was now counter proposing that Section 1.01, pertaining to recognition, read:

> [A]ll hourly, full time and regular part-time production and maintenance employees employed by [Respondent] at it's [sic] Albert Lea, MN facility; excluding office clerical employees, confidential employees, professional employees, managerial employees, supervisors, and guards, as specified in NLRB Case 18–RC–15576 dated 6 May 1994.

Removed altogether was the "technical employees" addition to the unit's exclusions. And, as recited above, no one objects to the lawfulness of Respondent's counterproposal.

Union-security and dues checkoff provisions were included in what had become article 2. Again, no objection under the Act is raised to either provision.

"Management Rights" became article 3 in the latest revised counterproposal. The nondiscrimination provision, agreed to earlier by Respondent, remains in the preamble. Stricken from the enumerated "illustration" of its scope are the unrestricted right to "suspend, discipline, discharge," and "demote" employees; to "Control the volume of production and the scheduling of operations"; to "Change schedules, processes, and work loads"; "To establish and change the length of shifts, the length of the work week, and the hours of work for any employee as determined by the needs of the business"; and, "To make and enforce reasonable rules for the maintenance of discipline and safety."

As to others, by December Respondent was counterproposing more restrictions on its illustrations of certain management rights, than had been the fact during June:

- Make work rules and regulations and change such rules and regulations, and to suspend, dismiss, or otherwise discipline any employees violating such rules and regulations. The Union shall be notified of changes in these rules as provided for under "Article 9—Shop Rules."
- Adopt and enforce drug and alcohol policies and implement drug and alcohol testing programs consistent with

applicable Federal and State laws; however, there shall be no random testing except as provided for under law.

- To establish incentive compensation programs to encourage and/or reward individual effort, productivity, health & safety, attendance, or any other desirable goal as determined by management; such programs to be discussed with the Union prior to implementation.
- The right to hire temporary, part time, summer, or specially skilled employees as such may benefit the business; *except that temporary employees shall not be used to perform bargaining unit work in the factory, if there are bargaining unit employees on active layoff status who are capable of performing the work and who desire to be recalled for that work.*
- To determine the number of hours per day or week that operations are to be carried on, subject to the terms and conditions of this Agreement.

The "*Seniority, Job Bids, Layoff & Recall*" article was changed from article 5 of Respondent's initial counterproposal to article 8 in the latest revised counterproposal. Article 5.02 of the former had read: "Seniority shall be kept on the basis of departmental and total company seniority." Article 8.02 of the revised latest counterproposal reads:

> The parties recognize that promotional opportunities and job security should increase with the length of continuous service where ability and performance factors are equal. Seniority shall be kept on the basis of departmental (*i.e. job class and description*) and total company seniority.

Article 8.03 continues to incorporate the 72-hour expanded posting period, replacing the 48-hour period originally counterproposed.

Respondent also incorporated an additional change in the layoff section. Respondent's June counterproposal, section 5.04, states: "Therefore, the least skilled employees will be laid-off first beginning with general laborers. Management has the sole right to determine the skill level of employees." In the newly revised counterproposal of October, Respondent had modified that language to read:

> Therefore, the least skilled employees will be laid-off first beginning with general laborers. *Within each job class, when skill levels are equal, the employee with the shortest continuous service will be laid off first*. Management has the sole right to determine the skill level of employees.

In the latest revised counterproposal of December, Respondent once more modified what had become section 8.04, mostly to accommodate the Union's position, so that it reads:

> Therefore, the least skilled employees will be laid-off first beginning with general laborers, *part-time employees, and temporary employees not possessing special skills.* Within each job class, when skill levels are equal, the employee with the shortest continuous departmental service will be laid off first. Management has the sole right to determine the skill level of employees.
>
> The "Shop Rules" article of Respondent's original proposal, Article 15, had read:
>
> Employees covered by this agreement will observe reasonable rules and regulations as may be established by the Company for the promotion of health, safety, and the welfare of the Company and its employees, provided such rules and regulations do not conflict with or supersede any of the terms of this Agreement.

That same subject became article 9 of Respondent's latest revised counterproposal. And, as a result of negotiations, by December it read:

> Employees covered by this agreement will observe reasonable rules and regulations as may be established by the Company for the promotion of health, safety, and the welfare of the Company and its employees, provided such rules and regulations do not conflict with or supersede any of the terms of this Agreement. The Company will, whenever practical, give the Union one (1) week's notice of significant changes in these rules and regulations. The Company may however impose changes it finds in its sole judgment are required urgently on shorter notice.

The same six holidays are counterproposed. Also the same in December were Respondent's counterproposals for Vacation and Sick Pay. Of course, as to holidays and vacations, Adams had made proposals for changes in his above-quoted December 11 letter.

The latest revised counterproposal contains the same language concerning group health insurance and pensions as appeared in the original counterproposal. However, appendages for those subjects were provided in December. The "Pension Appendage" states: "The Company anticipates a plan similar to the existing plan, but with a Company matching contribution of 2 percent." The "Health & Insurance Appendage" recites only, "Details to be developed."

As to those subjects, Adams explained that, as of December, group insurance "wasn't a subject of the core of the negotiations," and "that wasn't an area we were looking for savings in." In fact, he further testified, "at the end of the day we just intended probably to staple our medical book to the back of the thing and say 'This is the plan.'"

Significantly, Respondent made some movement in its "Wage Appendage." Each of the "General Labor" rates was increased by one dollar an hour. The first two "Operator" rates were increased 25 cents an hour, so that the first two Job Classes of the Wage Appendage in the latest revised counterproposal reads:

Job Class	Description	Rate 1	Rate 2	Rate 3	Rate 4
1	General Labor	$6.00	$6.50	$7.00	$7.00
2	Operator	7.75	8.00	8.25	8.50

Otherwise, that appendage remains the same as set forth in subsection M.

Once the parties were together, the negotiating session of December 15 began with Mediator Langohr saying that Kodluboy claimed he had not received Adams's December 11 letter, with the enclosed latest revised counterproposal, until earlier that same day. According to VanKampen's notes, Adams replied that he had faxed it from his home to Kodluboy and, so had been "unable to place it in the [Respondent] mailbox" at Albert Lea. Indeed, the December 11 letter shows that a copy had been served only on Langohr. Still, Nellis testified that he had received a copy of the latest revised counterproposal "a few days prior to the" December 15 negotiating session. Left unexplained was how that could have happened if Kodluboy truly had not received that counterproposal until December 15.

At Langohr's suggestion each side made a brief presentation. Adams went first. He highlighted Respondent's offer to trade existing vacation pay for the Union's concession to unpaid sick leave and, further, to add a seventh holiday for a shift differential reduction to 10 cents an hour. Of course, both trades would still involve concessions—of sick pay and of a reduced shift differential from existing levels. Yet, as Nellis conceded, Respondent was "increasing their [sic] proposals from the previous" ones.

Both VanKampen's notes and Nellis's testimony show that, when his turn to speak came, Kodluboy announced that there would be no concessions, or no more concessions, by the Union. Thus, Nellis testified:

> Mr. Kodluboy said that we had already given many concessions, *just taking a wage freeze* during times where inflation rate is 2.8 percent, *is concession.*
>
> . . . .
>
> He said that we would work with pay grades, but we would have to work up. And he said that, you know, "At this point we expect some movement form [Respondent]." *He said, "We have moved, now we expect some movement from [Respondent], or we can't move anymore.* And if there is no movement from [Respondent], we are headed for a problem. We will work with you." And at some point, Mr. Adams had brought up that there were pay grades and levels in other Steelworkers' contracts, and Mr. Kodluboy said that he doesn't use other contracts to negotiate his contracts.
>
> . . . .
>
> And Mike Kodluboy said, "You have good performance from your work force," he says, "and we can save you money in a wage freeze, and we can save you money in the 401K, and we can save you money in the insurance package, and we can save you money *through the use of temps to lessen the repetitive injuries*, to lessen your Workman's Comp claims." And, at that point, the conversation turned, and Mr. Adams said that he had never told people they would never be back to work. He said, "We employ people to make a product to sell and that is all." And Mike said, "We have made many concessions, *and we will make no more*." And Mr. Adams said he had never seen anybody in this industry, in the production end of this industry, make more than nine and a half dollars an hour. He said *if there aren't any changes from our side, that we are at impasse*. And Mike said, *"If you want more concessions from us, without any movement from you, we are at war."* And Bill's response was that the 401 was a huge problem for [Respondent] because [Respondent] handles the 401 in a total package of the entire Bridon America, or something to that effect, and just to take our facility out of that package, it was his position that it would actually cost him money. And, at that point, Mike said, *"No more concessions. It it is war, it is war."* [Emphasis added.]

According to VanKampen's notes, during Kodluboy's statements, Adams said, "Keep in mind this is not our final offer for wages," but when Kodluboy repeated, "We gave you concessions and we will go to war! We are good at making war," Adams retorted: "You are saying you will not talk wages. Then we are at an impasse." Nevertheless, when he testified, Adams acknowledged that, at that time, "We [had] more room to negotiate on wages in the context of all the economic portions of the contract."

During the February–March phase of the eventually consolidated hearing Kodluboy gave no testimony about the December 15 negotiating session. He did testify about it later, during the September phase of the hearing. By then, he had the benefit of the record made of the earlier phase of the hearing and, perhaps of greater significance, of arguments being made as a result of that earlier hearing phase.

When he did testify during September about the December 15 negotiating session, Kodluboy claimed that, "What we were discussing at that meeting . . . was primarily a settlement for all the unfair labor practices." He further claimed that his remarks about "no further concessions" had related "to the settlement of the unfair labor practices." Similarly, claimed Kodluboy, his statements about "war" had pertained to the settlement offer for the unfair labor practices, because Respondent's offer "didn't compensate the people that were involved."

It is accurate that Respondent had made a settlement offer during December which encompassed the alleged unfair labor practices. However, Kodluboy's claim that his remarks had been addressed to that offer, as opposed to Respondent's latest revised counterproposal, as well as previous counterproposals, is contrary not only to VanKampen's uncontested notes of the December 15 negotiating session, but, more importantly, to Nellis's above-quoted testimony. Indeed, that testimony refutes completely any assertion by Kodluboy that his "[n]o more concessions" and "war" remarks on December 15 had referred to anything other than Respondent's counterproposals.

VanKampen's notes continue by reciting that Mediator Langohr eventually suggested selecting another negotiating date as "we are more distant than we were earlier." When Adams protested, "We have made movement but are not receiving concession[s] back from the [U]nion," Langohr responded, "We are at a dam that we can't get around," and added, "I don't have any idea of where to go from here. The hearing [then scheduled for January] will possibly allow for movement."

Still, Langohr did not abandon further discussion that day. He met separately with the parties. During a meeting with Respondent's representatives, Langohr pointed out that the Union "could accept 6 job classifications except they want everyone paid the same. The ceiling [sic] wage they feel should be $13.12 plus the $.30 increase" promised by Bower. Adams replied, "I would still like to put out a letter for more give and take," since, he added, "It is usually better to have information in writing so everyone understands exactly what we mean." Asked if that wage proposal—"$13.12 plus the $.30 increase"—did not constitute "actually a retreat from [Kodluboy's] previous proposal, Nellis hedged: "I am not sure that was even a proposal. It was a statement made, and at that time Mike was very worked up. And we, at no time as a committee, ever sat down and suggested that."

Langohr suggested concluding the session and, in addition, canceled the session then-scheduled for January 3, 1995, rescheduling it, instead, for January 19, 1995. Adams testified, "I was going to leave the meeting and see if I could think of any other trade-offs that would be constructive in [Respondent]'s view that would open the door to discussion of economics."

It should not pass without notice that, through the December 15 negotiating session, Respondent had not provided an exact number of unit employees who would drop from $13.12 an

hour, as then paid, to the lower rates enumerated in Respondent's counterproposals. Nor had it supplied descriptions for its counterproposed job class and rate classifications. On the other hand, it is undisputed that the Union had never requested that information prior to December. Moreover, the subject of job classification, as well as the numbers of employees covered by each, were subjects contingent upon agreement to the underlying counterproposal to even have such classifications. Of course, that had not been agreed to by the Union at the conclusion of December 15's negotiating session. Finally, from the descriptions of jobs, and the notes reciting numbers of years qualifying their occupants for particular rates, in the wages appendages counter proposed by Respondent, it should not have been terribly difficult for the Union to ascertain the numbers of employees who would be included in each job class and rate classification.

Adams never got the opportunity to "think of any other trade-offs that . . . would open the door to discussion of economics" during December. Other communications intervened. During the February–March phase of the hearing, counsel were understandably guarded about receipt of evidence concerning communications between the parties involving settlement of unfair labor practice allegations. By the September hearing phase, however, that guardedness was abandoned. Then, evidence regarding those communications was adduced freely.

At some point after the December 15 negotiating session, Respondent made a so-called "global settlement offer"—one encompassing the alleged unfair labor practices, as well as the contractual subjects. Kodluboy addressed that offer in a letter to Adams dated December 21, the text of which states:

> Please be advised that, after a thorough review, the Committee and I find your offer total unacceptable. There is no compensation for those employees who have suffered losses due to your wrongful actions in laying them off.
>
> I must emphasize once more that we do not, and cannot accept major concessions from profitable business. Once more, I am telling you firmly
>
> NO Concessions!

That concluding line is typed bold-face.

Again, Kodluboy claimed, when testifying during September, that the letter in its entirety pertains to "the settlement Offer[.]" Yet, the second paragraph obviously restates the Union's oft-mentioned policy of not granting contractual concessions to "a profitable business," at least without first examining that company's books. Certainly, so far as the evidence discloses, there was no relationship between profitability and union willingness to settle alleged unfair labor practices. By contrast, of course, profitability did have a direct bearing on the Union's willingness to agree to economic concessions, as Kodluboy had stated repeatedly to Respondent.

That second paragraph in Kodluboy's letter, testified Adams,

> removed any question in my mind that those statements [about no more concessions, during the December 19 negotiating session] had been merely a flare-up of emotion since they were apparently and quite considerably placed in writing and emphasized not just subtly, but with huge type, I could only take it to mean, "I wasn't kidding at the last meeting you were at. I didn't lose my temper. If you misunderstand me, there will be no concessions."

By letter, dated December 27, 1994, Respondent's co-counsel notified Kodluboy:

> We have received your letter of December 21, 1994, addressed to Mr. Adams. Your rejection of [Respondent]'s settlement offer has, of course, caused it to expire and become null and void.
>
> Your correspondence goes beyond a mere rejection of the settlement offer, however, and reiterates your statements from previous contract negotiation sessions, ie, that you will not accept any wage concessions. Based upon your statement in this correspondence ("Once more, I am telling you firmly NO Concessions!"), and your statements made during the December 15 negotiating session, it is obvious that an impasse has been reached in negotiations with respect to wages. As a result, [Respondent] will be implementing its last wage offer, made during the December 15, 1994 negotiation sessions [sic], a copy of which is attached. The implementation will become effective on Monday, January 2, 1995.
>
> Obviously, [Respondent] will continue to bargain with respect to all remaining issues. Please contact Mr. Adams at your earliest convenience to establish the next contract negotiation date.

Attached to this letter was a copy of the "Wage Appendage" from the latest revised counterproposal, initially sent to Kodluboy with Adams's December 11 letter.

During the hearing, co-counsel for Respondent reiterated that, "[i]mpasse was only declared on wages and it was not declared on anything else." Adams testified that impasse had not been reached on any issue other than wages. As it turned out, however, no implementation of Respondent's wage appendage ever occurred.

Apparently, the Union took the December 22 letter to the General Counsel who needed time to investigate its propriety, as well as certain other matters. During a conversation about that investigation, Respondent's co-counsel agreed to defer implementation of the wage change. In turn, by Order Rescheduling Hearing, the start of the hearing in the instant matter was postponed to February 22, 1995.

On January 20, 1995, the Regional Director issued an amendment to order consolidating cases, consolidated and amended complaint and notice of hearing. It added, inter alia, the December 23 announced wage appendage implementation as an alleged violation of the Act. In the interval between December 23, 1994, and January 20, 1995, however, communications between the parties led Respondent to shift its direction regarding implementation of that wage offer.

R. Events During January and February 1995

During early January 1995, Respondent finally provided to the union copies of completed evaluations, which the latter had been requesting since September 1994, as discussed in subsection O.

In a letter dated January 9, 1995, Kodluboy notified Adams that:

> the Union is fully prepared to resume negotiations on the first labor agreement on the scheduled date of January 19, 1995 at 10:00 a.m. in the Albert Lea Labor Center. However, in preparation for that meeting, the Union would like to discuss not only wages, but all other economic matters

> as well, such as the benefits package, vacation, holiday, and any other economic items that have to be addressed.
>
> . . . .
>
> We are fully prepared to discuss the remaining language issues in their entirety so as to complete the process in a timely manner. We would ask that you come prepared to give us your position on all economic and language matters including which employees would fall into what classifications in [Respondent]'s view, and let us resume a fruitful negotiation process.

Adams testified that he interpreted the letter as showing "a willingness to really to really consider changes in the compensation package[.]" As a result, Respondent abandoned altogether its then-deferred intention to implement its wage offer and, instead, prepared to resume negotiations.

By letter to Kodluboy dated January 12, Adams stated that during the session on January 19 Respondent "would like to cover several issues. These include: . . . the relocation of production form Albert Lea to Jerome, and the contracting out of work currently performed at Albert Lea." He also stated that Respondent's latest revised counterproposal "remains on the table for discussion," and that, "We will come to the 19 January session prepared to discuss any areas which you identify to us in advance as being issues on which you are willing to negotiate." At the time that Adams authored this letter, he had not received Kodluboy's letter of January 9, quoted above.

By letter to Adams dated January 13, Kodluboy responded that the Union "already [has] a concessionary wage proposal on the table," and that "benefits" remain "to be addressed[.]" He expressed willingness to "work with you to achieve further savings," but pointed out that he was trying to do so "in a different manner" than Respondent was pursuing. As to Jerome, Kodluboy stated in his letter,

> Now you have the audacity to propose a relocation negotiation to Jerome, Idaho. Apparently, you have unilaterally decided to write off the excellent, loyal work force in Albert Lea who have consistently earned your firm a profit over the years and still do. We are not at an impasse in our view.

By January 17 Adams had received both of Kodluboy's January letters. By letter of that date, Adams requested "your comprehensive counter proposal" to Respondent's latest revised counterproposal of December. Adams then made "a couple of points" in his letter:

> First, as to pensions and medical. We must note that [Respondent] did not solicit the [Union] to provide help in the administration of any of our benefit plans. It is not [Respondent]'s desire to have the [Union] manage our Pension or Medical plans. In addition, our review shows that these plans have little or no associated savings.
>
> Since our 401k plan covers units other than just [Respondent], any change in the plan for hourly workers at Albert Lea would actually increase the overhead and administrative burden associated with pensions as we would have to maintain separate plans. Further, the administrative burden of the 401k is minimal for [Respondent].
>
> Your medical plan can not demonstrate savings of more than 15¢ per hour by our calculations; and this is not for identical coverage. Again here, unless workers outside the bargaining unit are covered, we will incur increased administrative expenses associated with reporting for two plans.
>
> However, if the Union wishes to identify the adoption of these plans as a negotiating goal of its own (since we believe that the [Union] makes a profit on these plans), we are prepared to negotiate them on that basis; and we would ask to see what economic concessions you are prepared to offer in return for our adoption of the [Union] plans.
>
> [T]he Albert Lea facility has fully loaded labor rates at least $8 per hour out of line with the competition and with our Jerome facility; and we have been clear that [Respondent] expects to close at least the greater part of this gap. Further, it should be clear that the 401k plan costs about 67¢ per hour (all from the actual contributions to the plan); and the medical plan costs $1.59 per hour (mostly actual claims experience). It is clear to us that an $8 gap can not be closed by changing the way that these plans are administered. To seriously address our economic needs, we have to talk about reductions in the base wages of existing workers and the major discretionary benefits (e.g. vacation, holiday, and sick time).

In the letter, Adams also addressed the situation with regard to work relocation to Jerome:

> Much of the work performed by bargaining unit members at Albert Lea could be performed at substantial savings by sending it to Jerome or having it contracted out in some form. We have quantified the differences for you and they are substantial. As a manager, it would be irresponsible of me not to pursue these large and obvious cost saving measures. In doing this, we do not "write off" the workers at Albert Lea. I would remind you that we are only involved in this long and costly process because we have attempted to offer our Albert Lea employees the opportunity to retain many of the jobs potentially affected. It is simply unrealistic that they can be retained at today's exorbitant compensation levels.
>
> Mike, [Respondent] will make any work relocation or contracting out decisions with great reluctance. However, you seem to have made this an all or nothing proposition. We have been attempting to negotiate these issues with our employees for nearly a year now; and we have been unable to make any progress.

During the negotiating session of January 19 the parties did not meet face-to-face. Mediator Langohr shuttled between separate locations where he had situated them. Near the beginning of the session, Langohr presented an "Economic Proposal" on behalf of the Union. In pertinent part, it states:

> The Union is proposing a wage incentive package that would be based upon the principals [sic] of profit sharing, using the job classifications as proposed by [Respondent]. However, the wage rates themselves would have to be negotiated individually for each classification where the lower rates are brought up and the higher ones being lowered somewhat. Based upon the rates that would be agreed to, a three ($3) dollar window could be initialized [sic] referenced to indices or rates of return on investment.

The Union also requested that it be provided with certain enumerated items of information, none of which is alleged not to have been provided, and, then, made a sick day proposal, as well as expressing willingness to lower shift differential. It also

requested clarification regarding Respondent's pension plan proposal and asserted that its medical plan proposal would save Respondent 50 cents an hour. Of course, Respondent had been seeking a significantly higher saving per hour.

According to VanKampen's unchallenged notes of the January 19 negotiating session, Mediator Langohr said that the wage program would be based on a anchor or base wage rate, such that if Respondent made a 20-percent rate of return, employees would be paid that base rate plus $3 an hour. But, if Respondent failed to make that 20-percent rate of return, wages could drop as low as $3 an hour below that base rate.

Respondent was receptive to that concept, which is referred to in the record sometime as indexing and sometimes as sliding scale. However, Adams cautioned, "We still need to look at the $13.12 an hour pay rate," and certain other issues—"Medical plan, contracting out labor, Jerome's production"—need to be discussed. Later during that session, Langohr brought back a list of the Union's three priority noneconomic items which also addressed two other topics. One was "MEDICAL COST." As to it, the Union handwrote that its proposal would reduce hourly costs from the $1.59-per-hour level recited in Adams's January 17 letter to $1.02 an hour, for a savings of 57 cents an hour. The second issue was Jerome. As to it, the Union wrote that since it "does not represent employees at Jerome," the Union "is not in a position to speak for them and the Union is primarily interested in retaining the work in Albert Lea."

By letter to Kodluboy dated January 20, Adams stated that the Union's medical proposal would not save the amount of money which it claimed—57 cents an hour—because its calculations are based on coverage of a single employee, whereas "the $1.59 figure includes [Respondent]'s contribution to family coverage." Thus, states Adams in his letter:

> In my letter of 17 January. . . . the cost to [Respondent] is calculated to be $185 per month. The cost of our PPO plan is shown as $168 in your proposal. This difference of $17 per month annualized to $204 per year. Dividing $204 by 2,180 scheduled hours, I calculate a potential savings of 9¢ per hour. Even this potential savings is contingent upon several assumptions: employees would have to accept the restrictions of the PPO option, we have to determine if the PPO is available in Albert Lea, similar savings would have to be available for family coverage (which is not clear), and employees outside of the bargaining unit would have to be required to join the same plan in order to avoid the costs of maintaining two plans.

As a result, Adams states, Respondent would derive "significant savings on the order of 50¢ per hour" only if, in fact, the Union was proposing elimination of dependent coverage or full contributions by employees for that coverage.

Confronted with the above-discussed letters, Kodluboy claimed that the Union had provided a proposal of "three categories, the single, single one and family." If so, he never produced that additional document. Moreover, although he claimed that Respondent provided Geisler with sometimes incomplete and other times belated information pertaining to Respondent's existing health plan, as pointed out in subsection M, Geisler did not appear as a witness, Kodluboy had scant, if any, personal knowledge about Geisler's communications with Respondent and, consequently, I do not rely on what secondhand testimony there is concerning what may or may not have occurred during those communications. In any event, there is no allegation of unlawful delay or unwillingness by Respondent in providing information requested by Geisler.

By letter to Kodluboy dated January 24, Adams provided "a comprehensive draft proposal" which, Kodluboy acknowledged, did incorporate a sliding scale or wage indexing concept. That was contained in a number of attached pages on which were calculated various wage rates, depending on which formula the parties might agree upon. Several other counterproposals were modified, apparently based on comments made through Langohr during the negotiating session of January 19.

The next negotiating session occurred on January 25. The parties remained separated through it. From VanKampen's notes it appears that both sides had been optimistic about the sliding scale or wage indexing concept. There was mention of working out profit goals. The Union promised to provide a comprehensive plan on February 6, followed by another negotiating session 4 days later. Langohr asked Respondent to provide "a list by name [of] what classifications people would fall into," and Respondent agreed to do so.

By letter to Kodluboy dated January 27, 1995, Adams provided two pages of "PERFORMANCE INCREMENTS" tables. By letter dated February 3, 1995, Kodluboy submitted to Adams "a clean copy of what we have agreed to and our counterproposal for our next negotiating session," pointing out that, "Our counter is enclosed on all remaining items. Basically, if it is in here, it is what we are prepared to sign off on."

Attached as "APPENDIX 'A"' was a wage scale which recites:

Job Class	Description	Rate 1	Rate 2	Rate 3	Rate 4
1	General Labor	$7.25	$7.50	$7.75	$8.00
2	Operator Technician	12.25	12.50	12.75	13.00
3	Extruder Tech	12.75	13.00	13.25	13.50
4	Mechanic	12.75	13.00	13.25	13.50

Lead Person	+50 cents above the classification.
Rate 1	Probationary
Rate 2	End Probation to one (1) year
Rate 3	Over one (1) year less than three (3) years
Rate 3 [sic]	Over three (3) years
Night Shift	30 cents

> No active employee as of December 1, 1994 shall be paid less than Job Class 2, Rate 4 regardless of the job they perform.

No reference is made in this "counter" to the sliding scale or indexing concept suggested by the Union during the preceding month. When he testified, Kodluboy claimed that this wage proposal was, in reality, an alternative proposal advanced because there had not yet been agreement on a "base wage rate" for sliding scale or indexing. But, he did not explain that to Adams.

Adams questioned that omission in a letter to Kodluboy dated February 9. This letter's statements are significant in many other respects. For, it states, and sometimes restates, Respondent's positions regarding a number of issues. Many are subjects which, when isolated during subsequent negotiations, sometimes create an appearance of impropriety by Respondent in connection with its positions on those subjects—or, at least, are characterized as improprieties.

In consequence, that February 9 letter's text is worth quoting at length, so that positions during subsequent negotiating sessions, and correspondence related to those sessions, can be evaluated with better understanding. The letter states:

> First and most importantly, we see no reference to the "indexed wage" concept you proposed several meetings ago; and which has been the focus of our discussions since that time. Are we to understand that this is no longer the approach you wish to take? If so, we have devoted considerable time and effort to a dead end. Also, this change would require us to substantially modify the position we took on some economic items, given that we developed our most recent economic proposal in the context of the index concept.
>
> We are particularly puzzled by the economics in this proposal. Your wage appendix would actually result in a net increase for existing hourly employees. This would therefore represent a retreat from your earlier position of a wage freeze; and as such it is not even something that we can counter.
>
> Once again, I feel compelled to restate [Respondent]'s position. The wage and benefit package for the hourly employees of [Respondent] is completely unrealistic. It is grossly out of line with both our community and our industry. We began this process in order to achieve a significant portion of the considerable savings that are available in this area; and we remain committed to bringing our costs into line. Consequently, your economic position continues to be at variance with the economic reality we have presented to you.
>
> . . . .
>
> There are significant and important portions of our documents where we appear to be in substantial agreement at this point. However, we have three areas outside of basic wage and benefit issues where we have important disagreements: seniority, contracting out, and the role of working supervisors. We are prepared to discuss these issues in detail; and I will briefly address each area here in order to establish some context for the discussions.
>
> . . . .
>
> As to contracting out, we simply can not accept a blanket prohibition as contained in your last document. I think we understand your concerns and are willing to try to address them. We offered what we feel was extremely constructive language that offers substantial protection to your members in our last proposal; and the feedback that we received at that time was positive. I'd like to review this again tomorrow since I had thought we were closer here than now appears to be the case.
>
> Finally on working supervisors, again we can not accept a blanket prohibition as contained in your proposal. This language has not evolved at all. We do understand your concerns; and we are willing to discuss ways to offer reasonable protection to your members. On the other hand, we are a small factory that has always operated with working supervisors. A blanket prohibition simply serves to sharply drive up our already excessive employment costs. If you could formulate some language that would address your concerns in a more focused way, we would try to work with it and formulate a constructive counter; but your existing language is simply too blunt an instrument.
>
> On all of these issues, we feel that we have real operational concerns. Obviously it is our desire to operate our facility as economically as possible. Unnecessarily restrictive language in any of these areas simply serves to drive up cost without offering real benefits to our workers. Consequently, it reduces our flexibility in the areas of wages and benefits by locking in operational inefficiencies. Since even [Respondent]'s last economic proposal would leave [Respondent] at a 15 % + disadvantage relative to the industry for our current employees, it just makes good sense to us to avoid building in new and unnecessary costs.
>
> Finally, a quick comment on medical and pension issues. Let me reemphasize that [Respondent] has reviewed your proposal on both of these issues several times in the past. We see no way that either plan offers any benefit to [Respondent] whatsoever. Your continuing reference to the benefits that these plans would provide to [Respondent], while providing absolutely no evidence to support this position (and ignoring our analysis showing the contrary) is becoming tiresome. We are prepared to look at facts if you have them. Unsupported claims simply waste everyone's time.
>
> I addressed the medical issue in some detail in my letter of 20 January 1995. Having reviewed the details myself, and feeling well qualified to evaluate such issues, I remain convinced that your plan offers no savings to [Respondent]; and you have provided no evidence to the contrary. I note your offer to explain the plan further. Since you think you see savings where we see none, some further explanation would be in order. However, since this is a technical area, I suggest that we not use time at the negotiating session; but rather set up a separate meeting between our financial people and anyone you care to bring forward to explain your position.
>
> The pension issue is more complicated. As I have mentioned, the [Respondent] 401k is part of an overall [Respondent] plan. Separating us out of this plan involves some considerable effort and expense I believe. In addition, this change would not be entirely within our local authority since it could impact other units.
>
> Since there are no savings that we can identify from this change, this becomes another area that pushes up cost rather than achieving reductions. As such, the consideration of your pension proposal is incompatible with our existing wage and benefit proposal. Of course, if you wish to pursue the pension proposal as a separate issue, we remain prepared to discuss it on that basis. However, we would expect to achieve savings in wages or other benefit areas sufficient to justify our accepting the cost and inconvenience associated with your plan.

The next negotiating session was conducted on February 10, with the parties again separated. Mediator Langohr informed Respondent that the Union was still interested in the sliding scale or indexing concept, and, "Mike K wants to have the base wage at about $13.00/hr," according to VanKampen's notes. Adams said to Langohr that Respondent could not operate at a competitive wage rate disadvantage. He also said that Respondent could see no savings in the Union's medical proposal and,

further, would actually have to pay more if it were to "break free from the Bridon American" pension plan.

After conferring with the Union, Langohr said, "They would like a copy of the short term, long term, and life insurance." So far as the evidence discloses, this was the first occasion on which the Union had asked for this information, at least during negotiations with Adams. After another conference with the Union, Langohr reported that the Union wanted "in writing, from the current wage level of $13.12, what wage level [is Respondent] requesting." Though Adams protested that Respondent had already provided that wage information, saying, "They would be at the first decrement which is $11.03 weighted average," he ultimately agreed to do so. When the subject arose, Adams continued to assert that Respondent needed working supervisors. In view of the approaching hearing in the instant case, starting on February 22, the parties agreed to Langohr's suggestion that the next negotiating session would be conducted on March 16, 1995.

By letter dated February 10, 1995, Respondent provided copies of its "Employee Benefit Health Plan, Long Term Disability and Life Insurance programs," as requested by the Union, through Langohr, earlier that same day.

By letter to Kodluboy dated February 13, 1995, Adams also provided information which he had promised on February 10 to provide:

> Per your request, I am enclosing the rate schedule that would be in effect for the current quarter under the ROACE formula that we proposed on 25 January 1995. It would result in a weighted average base wage of $11.03 per hour for existing employees. This represents well over a 20% increase from our initial proposal.
>
> By contrast, we have seen absolutely no movement in the Union's position on wages. Your current proposal appears to actually be a retreat from your previous position of a wage freeze for current employees; and, further, you have backed away entirely from your positions taken at the previous two meetings; where we were clearly led to believe that you understood that wage and benefit reductions were necessary. The entire ROACE concept was developed at your request; and yet it appears irrelevant in the context of your counter offer. In any case, [Respondent] was greatly disappointed in the response to our offer of the 25th.
>
> We also understand that you have declined our request to offer more focused language regarding the duties of supervisors (your Section 3.03 which apparently should be 3.04). I will try to clarify [Respondent]'s perspective on the issue for you by placing it in purely economic terms. We operate a fairly small facility. Supervisors are, and always have been, an integral part of the work force. The type of restrictions you propose would effectively increase our staffing needs by one person per shift, or about 10 percent. Consequently we would be prepared to accept your language, combined with a 10% across the board reduction in our proposed wage table. It is a choice between creating more jobs at a lower wage; and maintaining the highest possible wage for the existing jobs.

By letter to Adams, Kodluboy responded to the above-partially quoted February 13 letter. This letter, and Adams's response to it, most completely state the parties' positions in their own words.

In his letter, dated February 14, 1995, Kodluboy informed Adams:

> Last July we presented you with a proposal to freeze the bargaining unit wages for the next three (3) years. That was true then and is true now. That alone, based on current inflationary predictions, is a concessionary offer between 8 or 9 percent over the next three (3) years.
>
> We adjusted the language proposals over that period of time towards [Respondent]'s view. We offered up the sick days in order to preserve the vacations providing, of course, [Respondent] carry the long and short term disability insurance. We thought we were close to concurrence.
>
> Further, we offered you a medical package that could save your firm tens of thousands of dollars in a single year based upon the costs of the present insurance you now carry. Those costs are from the data you provided this office. If you don't see the savings or if the data was inaccurate, please provide us with figures to the contrary.
>
> We also offered to put $3.00 of the present wage rate at risk tied to an index of 10 percent rate of return as the base to retain close to present day wages with the rates of pay going up as we approach the 20 percent rate of return. That is an incentive program where we could both win and is still on the table. We were originally encouraged at your first reaction to this concept. However, as I understand your reaction to our counter proposal, you want us to take a $3.00 cut and then apply the index on the rate of return to at least 20 percent before we could ever reach present day wage rates; possibly, we could never reach these rates. Please clarify.
>
> . . . .
>
> We also offered your firm a defined pension plan that we are prepared to reduce your present costs of $.66 per hour to something less. As we understand, your response was no to this offer. In fact, we don't see any attempt by [Respondent] to maintain anything close to what is now in force under the Corporate 401(k) program. Are we interpreting your last proposal incorrectly? Please clarify.
>
> We thought the vacation proposal was close to acceptance. On February 10, 1995 you proposed a two (2) tier vacation scheme where present day employees would retain what they now have, but new employees would be dramatically reduced. Please clarify.
>
> Since the first day we met with you and heard your desire to obtain a 20 percent or greater rate of return, we have been trying to work with you to obtain that goal albeit in a different manner. To that end we have approached that objective by closing in on the entire economic package, not just wages. Are we thinking incorrectly that that is not the approach? Please clarify.
>
> . . . .
>
> Please understand that we are very willing to discuss and negotiate a wage scale indexed to [Respondent]'s rate of return on investment; however, we still are proposing that something close to present day wages must be indexed to a 10 percent rate of return, and as we approach 20 percent we have a chance to earn more. The risk that we would reduce or lose wages should be tied in with the chance to earn more if we succeed. Three dollars of risk must be, or should be, compensated with a $3.00 chance to earn more. Are we thinking incorrectly that that is fair? Please advise us.

That letter generated a response to Kodluboy from Adams, dated February 21, 1995. In it, Adams informed Kodluboy:

> First, to answer your final question, [Respondent]'s position certainly is that wages and benefits at our Albert Lea facility are grossly out of line with the community, our other facility, and the industry (on the order of 40–50%). And our analysis shows that the only way to address this disparity is through cuts, in absolute terms, in wages and benefits. I feel that we have been clear and consistent in conveying this position from the beginning, as we feel that we owe our employees an honest assessment of the future for them and [Respondent]; and we can't help but find your recurring "surprise" at these facts somewhat disingenuous.
>
> What has been inconsistent in our view is your response to this reality. Through all of our negotiations you have repeatedly stated that no economic concessions were possible. Then during our meetings in January, we were clearly led to believe that you had modified this position and were prepared to discuss some constructive plan to bring the wages and benefits of your members into line with industry and community norms. Your counter of 3 February seemed to back away from this stance, as you again profess surprise and confusion that [Respondent] is proposing wage and benefit reductions.
>
> We are pleased to hear that at least your original offer of a three year wage freeze is still valid. This proposal however, while no doubt quite attractive to your members who are earning premium wages they almost certainly could not find elsewhere in the community, would lock [Respondent] in to these unrealistic costs for an unacceptable period of time; at the end of which time we would be only 32–42% out of line. Thus, we do not see this proposal as seriously addressing [Respondent]'s economic issues. It is simply not a scenario we are prepared to live with.
>
> Further, [Respondent] is quite unhappy with the existing returns earned by the business; and has clearly determined that the hourly wage and benefit package is the most significant cause of these unsatisfactory returns. Consequently, our interest in exploring the indexed wage concept was expressed only in the context that you understood that wage and benefit cuts were necessary at existing levels of profitability. The mediator assured me that he felt this was the case. Our understanding was that you sought a way for your members to share in potential future profit gains; not that you sought to avoid the inevitable initial reductions.
>
> Based entirely upon our optimism that you finally recognized economic reality, [Respondent] responded with a significant proposal. It included our major economic move; which as noted in my letter of 13 February, puts our current wage offer for existing employees well over 20% above our initial offer. We feel this proposal represented a constructive compromise between [Respondent]'s need to bring its costs into line with the competition and the employees desire not to lose all at once the entire premium over local and industry wages which they have become accustomed to.
>
> In response to this, your counter offer left wages for current employees, holidays, and vacations at or above where they were in your proposal in July. It also addressed none of the concerns we've expressed about your medical or pension proposals; and it still included nothing to document your claims of savings. In other words, your economic response to our weighted average $2.00/hour + increase in [Respondent]'s wage offer was a 10 [cents] (5 [cents] hour weighted average) reduction in the night shift premium. We just don't see this as serious negotiating.
>
> [Respondent]'s position therefore, as to your offer to reduce the shift differential, is this; we will not counter a 5 response to a $2.00+ improvement in our offer. We have made our significant economic move in hopes of expediting the negotiating process. We expect to see a move of similar size on the key issue of wages before we consider further modifications to our economic proposal.
>
> . . . .
>
> Moving on to other items in your 14 February letter. First, as to your medical proposal. We never received any written information suitable for evaluation until mid-January. At that time I informed you that we saw no savings for [Respondent] under your plan. Following this, we have received only one analysis documenting your expected savings. This was a hand written document provided at one of our negotiating sessions. I personally reviewed this document and responded to you in writing (my letter of 20 January 1995) that your comparison was faulty. You have never provided another analysis. Nor have you answered the other concerns we expressed.
>
> Once again, we stand by our assertion that you can offer us no savings in the medical area. The reason for this is that we are essentially self insured. The rates we quote for comparison are based on last year's actual expenses and the COBRA formula. Since no plan is going to insure us for less than our actual claims experience, no insurer can deliver savings to us in this area. Note that Section 2, paragraph 2 of our own submission requires the employer to agree to increase its contribution about the quoted rates if the cost of the plan exceeds the employer's payments. This leaves [Respondent] in a much worse position than we are in today, as we can not realize the benefits of actual claims experience being less than the quoted rates; while we continue to bear the downside risk of poor claims experience. Unless you formulated a detailed and *accurate* analysis documenting your claim of savings, we do not consider this a realistic option.
>
> On page two of your letter, you inaccurately state that we expect a $3.00 per hour wage reduction prior to indexing. My arithmetic makes it a $2.00 per hour reduction; and yes, that is what we expect. You are correct in stating that our proposal does not purport to insure that after wage reductions are implemented, that there is some safe and sure mechanism to return them to current levels. *The whole issue in these negotiations is that you seem unable or unwilling to grasp that wages at [Respondent]'s Albert Lea plant are unrealistically high; and that [Respondent] feels that continuing to operate this facility at a 40% + labor cost disadvantage is simply not an option*. We don't think it makes sense to try to compete in the market place against companies like Exxon, while saddled with this cost disadvantage in wages; and with wages being the largest single component of our conversion costs. What we do intend to insure is a stable, profitable company that can grow

and provide secure jobs at fair wages long into the future. That should be your goals too.

. . . .

As to pensions, I am even more lost as to where savings are envisioned than I am with medical. Your proposal is for a contribution of 66[cent]/hour worked. *This is our actual current cost of the 401k*. Since you proceed in Section 4 to redefine Hours Worked as something completely different from hours actually worked (and substantially greater than hours worked) the impact of your plan could only be to substantially increase cost. In addition, you have in no way addressed the other issues we raised which would further increase costs by requiring the maintenance of two plans. Nor do we even have sufficient details with your proposal to evaluate the actual value of the plan to our employees. No detail of benefits is included for instance. We even had some questions as to whether our bargaining unit qualified to be part of your plan.

. . . .

On the other hand, we also have absolutely no problem with negotiating with you on this issue. We simply object to your implication that this plan helps [Respondent] in some way and therefore merits some offsetting concession. In fact, the plan would cost us more than our present plan; and costs greatly more than our proposed plan. Consequently, it is incompatible with our current proposal on wages and other benefits.

To clarify our pension proposal, the 401k is definitely an area we targeted for savings. The plan at Albert Lea is richer than we feel is necessary. Since we are trying to preserve a premium base wage structure, it only makes sense to us to try to attain the maximum savings in areas that have less direct and immediate impact on our employees finances. Of course we would consider maintaining the existing 401k at existing levels; however, this option is not compatible with our current base wage proposal.

. . . .

We understand fully the concept of looking at economics as a total package and not just wages; however the economics of your overall proposal are worse than the wage portion taken alone. We focus on wages because that is where the significant dollars are. Wages (and benefits whose cost is a direct proportion of wages) constitute the greatest part of our conversion cost. Further, you have not actually demonstrated *any savings* in any of the other areas which you routinely refer to; and my own analysis shows that your proposals in the areas of pension and medical for instance would, with certainty, increase costs. On top of this, you propose to establish new and less efficient work practices which would increase labor costs on the order of 10%.

Finally, I was interested to note that you still maintain an interest in the *indexed wage* concept. You will excuse me for being unable to discern this from your written counter proposal of 3 February 1995, which makes no mention of the concept; and which in no way responds to the specific, detailed mechanism and rate tables which we formulated in response (as we saw it) to your request. In any case, we responded to the rather sketchy concept you presented through Alan Langohr as best we could.

Given that there was not an acceptance on your part of the necessity of incorporating a wage cut at current profit levels, we may propose to make the wage schedule attached to my letter of 13 February 1995 a firm offer, unaffected by performance increments up or down. The *indexed wage* simply over complicates an already difficult issue. Therefore, unless it proves somehow to be a unique door opener to a realistic wage expectation, [Respondent] has no further interest in the concept. We would, of course, regard this change as an significant further concession, since it would cause us to forego the potential relief of substantial further wage reductions in the event of future business reversals. Consequently it would require us to review the other positions taken in our 25 January document as to their economic implications.

You will note that under this proposal, no existing [Respondent] employee can make less than $9.88 per hour.

S. Events During March and April 1995

By April, and perhaps as early as February, Respondent admittedly had decided to make a change in selecting among employees who responded to postings for job vacancies. It is uncontroverted that practice prior to 1995 had been to select for vacancies the most senior employee who applied for a posted vacancy. In fact, that is what is provided for in section 4.4 of the 1992–1993 Agreement with the employee committee, as recited in subsection D. VanKampen conceded that selection by seniority had not been affected by the fact that the most senior applicant might have been subject to work restrictions. And, though he equivocated when asked initially about the practice, VanKampen did admit that prior to 1995 there had been at least one shift with more than one work-restricted employee working on it.

Advised by a physician to "keep employees spread out, the ones with restrictions," among the shifts, VanKampen testified that Respondent decided to take into account in selecting among applicants whatever work restrictions any of them might be working under. As a result, when McKane and Joel—both subject to work restrictions—responded to a posting, they were skipped over and a less senior employee, with no work restriction, was selected for the vacancy.

As to that selection, VanKampen explained that there already was one work-restricted employee, Dave Gotland, on the shift on which that vacancy had arisen. By late winter and spring of 1995, there were only approximately 39 production and maintenance employees working at the Albert Lea facility—a roughly one-third reduction in the total number of those employees since Adams had become Respondent's president. As a result, there were fewer regular employees working on each shift than had worked on each shift during early 1994. That created a problem whenever there were more work-restricted employees on a shift during 1995, testified VanKampen, than has been the fact a year earlier and before.

Respondent never contended that it had given prior notice to the Union of that change in practice for selecting among employees who responded to vacancy postings. Nor is there any evidence which would support such a contention, had it been made. The General Counsel alleges that by failing to give prior notices of that planned change, and by failing to afford the Union an adequate opportunity to bargain about it, Respondent violated Section 8(a)(5) and (1) of the Act.

Although the parties had arranged to next meet for a negotiating session on March 16, as a result of an appeal during the first week's hearing in the instant proceeding, the Union and Respondent resumed negotiations on March 6. At that session, Dan Bryant replaced Langohr as mediator and the parties met face-to-face.

When negotiations reached the subject of wages, Kodluboy continued to propose "a wage indexing plan," but said the Union felt "the base index should be about where it is right now—that is, at $13.12 an hour—and that there would be a decline from that base only if Respondent "drops below say 10 percent [rate of return], then we would give up wages. If profits go above 10 percent then we would receive more"—that is, more than $13.12 an hour.

Not surprisingly, that proposal was not acceptable to Respondent. Adams asserted, "the way we have the contract written, nobody would work under $10.00 per hour" and, "We don't see any cost reduction in your proposal." As the argument about it continued, Kodluboy asked if savings in benefits should not be reflected in wages. Adams agreed. But, he pointed out, "The fact of the matter is we are extremely high in wages." This exchange concerning wages reflects the positions of the parties which prevailed throughout the remaining negotiations, as will be seen below and in subsection T, infra. In the end, it would be the essence of why no final agreement would ever be reached.

Negotiations resumed on the following day, March 7. As discussion progressed, Adams offered not to increase production at Jerome, nor to use temporary contract labor, "if it means laying employees off at Albert Lea." The parties completed reviewing proposals and agreed to meet again, as scheduled, on March 16. Adams promised to prepare a "clean copy" of an agreement, reflecting where the parties stood on tentative agreement to contract terms.

By letter to Kodluboy dated March 14, 1995, Adams transmitted a "Draft Collective Bargaining Agreement." In the letter, he set forth "a summary of the changes and a review of the status of the various Articles of the agreement as we understand the situation." The accuracy of that recitation is not contested. Compared to Respondent's June original counterproposal, described in subsection M, and to its December latest revised counterproposal, described in subsection Q, that draft collective-bargaining agreement reveals not insignificant further movement by Respondent in trying to reach terms for a collective-bargaining contract.

The "illustration" enumeration of management rights, now listed as section 3.02, and with each item numbered, makes three changes. First, "Reduce the work force, if, in the Company's sole judgment, new equipment, circumstances, or methods require fewer employees," is modified so that it reads: "Reduce the work force *according to the procedure defined in Article 8* [Seniority, Job Bids, Layoff & Recall], if, in the Company's sole judgment, new equipment, circumstances, or methods requires fewer employees."

Second, "the right to hire temporary, part time, summer, or specially skilled employees" illustration is once more modified, from what appeared in the latest revised counterproposal, so that it reads: "The right to hire temporary, part time, summer or specially skilled employees as such may benefit the *business, subject to the terms and conditions of this Agreement*."

Finally, since Respondent's June original counterproposal, one "illustration" of its management rights had been:

> Select and assign new employees, determine the number of employees on a job, determine the job content, and to introduce new jobs during the term. Nothing in this agreement shall be interpreted to interfere with the Company's right to assign work, including the right to assign employees to perform work not regularly included in their respective classifications, when the same is deemed necessary according to the needs of the business, and/or to avoid payment for idle time.

As to that "illustration," the draft collective-bargaining agreement states:

> Select and assign new employees, determine the number of employees on a job, determine the job content, and to introduce new jobs during the *term of the Agreement, subject to the terms herein.*

Two other aspects of the management rights counterproposal of March are particularly significant. First, in its draft collective-bargaining Agreement, Respondent struck the provision: "It is further understood and agreed that the prerogatives of the Company as stated in this article are not subject to the grievance or arbitration procedure except those prerogatives relating to discipline, discharge, suspension, promotion, demotion, and release."

Secondly, by March, a new section, section 3.03, had been added to the management rights article. It pertained to temporary employees:

> Temporary Employees: The Company may contract temporary employees through an independent agency; however these employees shall be intended to cover genuinely temporary fluctuations in production or special projects. Thus, any contracted temporary employee who works continuously in the plant for four (4) consecutive months shall be hired as a regular part time or full time employee of the Company and shall be subject to the provisions of Article 2—Union Security and Dues Check Off. This restriction shall not apply to contracted employees with special skills, or to temporary employees employed in boxing and shipping operations in the Company's warehouse.

That last sentence pertained to the Cedar Valley Services clients, whom Respondent's employees contended had always worked only in the warehouse.

Added to "*Article 6—Discipline or Discharge*," at the Union's request, is the provision, "The Company shall also notify the Union of any quits within ninety six (96) hours after the Company becomes aware of the quit. Notice of quits may be given verbally." Also at the Union's request, modifications were agreed upon for "*Article 7—Grievance Procedure,"* providing for a step involving the Federal Mediation and Conciliation Service before the parties proceed to arbitration in the final step.

As mentioned in subsections M and Q, since its June original counterproposal, Respondent has been counterproposing 24 hours of vacation for employees who worked 1 year and 40 hours of vacation after an employee had worked 5 years. By March, Respondent had accepted the vacation table proposed in the Union's original June proposal, as described in subsection M: 7 days' vacation after 1 year's continuous service, 8 days after 3 years, 9 days after 5 years, 10 days after 7 years, 11 days after 9 years, 12 days after 11 years, 13 days after 13 years, 14 days after 15 years, and 15 days after 18 years. Acceptance of

that proposal by Respondent is particularly significant. That had been the vacation schedule enjoyed by employees under the Agreement with the employee committee. So, Respondent was no longer counterproposing by March 1995 that employees accede to concessions in vacation benefits. Sections *of "Article 16—Hours of Work and Overtime"* were modified "to introduce [the Union's] concept of Equalized Overtime."

Most significant were the appendages included with the draft collective-bargaining agreement. Fully explicated "Pension" and "Health & Insurance Plan" appendages were attached. Furthermore, Respondent counterproposed higher wage rates for all now-six job classes and for all four rates than had been proposed in its December latest revised counterproposal, which also had increased counterproposals for some rates:

Job Class	Description	Rate 1	Rate 2	Rate 3	Rate 4
1	General Labor	$7.13	$7.36	$7.36	$7.36
2	Operator	7.60	8.08	8.55	9.71
3	Maintenance-Junior	9.88	10.45	10.93	11.16
4	General Tech	10.69	11.64	11.83	12.35
5	Extruder Tech	11.40	12.11	12.59	12.83
6	Maintenance-Master				
7	Mechanic	11.88	12.59	12.83	12.83

At the bottom, the "Wage Appendage" recites: "No active employee as of 1 December 1994 shall be paid less than their rate at Job Class 2, regardless of the job class that they work in." At the top of the Wage Appendage appears the phrase, "See attached schedules," apparently referring to the indexing schedules supplied to Kodluboy by Adams with the latter's January 24 letters, as described in subsection R.

The negotiating session on March 16 began with Respondent being given a two-page handout, the first page of which states:

> The Union would like to clarify a couple of misunderstandings brought to our attention at our last negotiation session on March 7th, 1995.
>
> 1. We believed that it was understood that the insurance that the [U]nion was recommending, included a contribution of 135 dollars by the employees for dependent coverage.
>
> 2. The Union would also like to state that at the Feb. 10th meeting in Albert Lea, we presented a proposal that had a wage proposal that was intended to include indexing. We made it very clear to Alan Langhor [sic] that indexing was part of that proposal. We interpreted from our discussions with Mr. Langhor [sic] that day that this was understood by [Respondent].
>
> 3. We also informed you that we would be agreeable to trading our sick days to retain our current level of vacation which included one personal day and our birthday, which were used as vacation.
>
> We hope that this clears up any misunderstanding between the Union and [Respondent]. And hope to discuss these issues with you on March 16th, 1995.

The second page concerned establishing a smoke-free facility, with provision made for an area that would accommodate smokers.

Kodluboy characterized the handout, according to VanKampen's unchallenged notes, as "the clarification you requested in writing." After a review of those items and negotiation concerning some of still-unresolved articles, the parties adjourned until April 14, by which time the February–March phase of the hearing in the instant proceeding would be completed. Kodluboy was the party who asked to set the negotiating session after that hearing, since "I had a pressing problem with another company" which had been unable to meet its payroll, he explained.

Adams sent another letter to Kodluboy, dated March 21, 1995, in an effort, he testified, "to take a big step to the side and come at it from a different direction." In it, he made two alternative proposals. The first was that Respondent "would agree to use the contract that the USWA has been operating under at our sister company in [Wilkes-]Barre, PA as the basis for settlement," which would include "the wage scale in effect at [Wilkes-]Barre as of 1/1/95, with the rates for each job class at [Wilkes-]Barre applied to the most similar job class at Albert Lea." The alternative proposal was to accept the language proposals as agreed upon by Respondent through the negotiating session of March 16, 1995, the pension and health care appendages as proposed by Respondent, and wage rates "based on the wage paid by Exxon Chemical, our largest competitor."

It was Unit Chair Nellis who responded, by undated letter, to that letter and its proposals. He rejected both alternative proposals. However, he renewed the Union's interest in the sliding scale or indexing concept.

By letter dated April 6, 1995, Adams acknowledged receipt of Nellis's undated letter, requested "new economic offers," in view of the Union's rejection of Respondent's most recent offer, and pointed out:

> No one could be more frustrated than [Respondent] with the fact that we have not reached an Agreement after this considerable time. The difficulties we have encountered in negotiations stem from one fact; [Respondent] is convinced that no economically viable Agreement is possible unless there is a reduction in our extraordinary hourly wage costs to close the gap with our competition; while the Union's position has been that the current employees are absolutely unwilling to consider a reduction in wages. With this fundamental difference, progress is difficult on key economic issues.
>
> We feel that if the Union can come to a recognition of the fact that a more competitive wage scale is necessary, that rapid progress can be made toward resolving all of the outstanding contract issues. However, every indication that we have is that the Union remains totally inflexible on this issue.
>
> If we misunderstand your position and you are prepared to negotiate on the issue of wage reductions, we would certainly appreciate if you would present a revised proposal at or prior to our next negotiating session. Otherwise, our negotiating options are quite limited given the Union's lack of any flexibility on our key issues. In any case, since the last couple of revisions and options have come from us, we think that the ball is in your court. Show us something we can work with.

That did not occur. The first part of the negotiating session of April 14 was spent reviewing information about medical plan and benefits provided by Respondent, with Kodluboy arguing that the Union's proposed plan saved Respondent money and with Adams arguing that it did not. Significantly, there is no allegation that Respondent bargained in bad faith concerning this subject. Then the parties turned to wages, renewing the

argument over the base rate to be selected. Again, there is no allegation that Respondent bargained unlawfully in connection with that subject of base wage rate. During discussion of it, Adams said, "The problem is every person is being paid basically the same wage. To best utilize our current situation, I could bring Jerome up and slow Albert Lea down. I don't want to do this. So if you [sic] talking strictly economics, Jerome is the best option at this wage level." That quotation is taken from VanKampen's notes, the accuracy of which is not contested.

The negotiating session of April 18 began with Respondent distributing "updates" which Kodluboy agreed made "progress" on seniority. In fact, most of the prelunch portion of that session was spent discussing seniority. One specific aspect of that discussion was the fact that, as discussed at the beginning of this subsection, McKane and Joel had been passed over in selecting an applicant for the posted vacancy.

As the session progressed, the parties reached tentative agreement on Article 8.03, "*Job Postings*" so that it would read, to the extent pertinent:

> Job assignments will be made based on total Company seniority and management's assessment of the employee's ability to perform the job taking into account factors such as current skills, related experience, trainability, attitude, attendance, and demonstrated performance at his/her current position.

They also reached tentative agreement that article 8.12, "*Shift Preference*," would read:

> When a vacancy occurs, preference of shifts will be granted to employees in accordance with seniority provided that such preference does not interfere with plant safety, efficiency, or production, and further provided that the employee has the ability to do the work.

It was in connection with that latter section of article 8 that union employee-negotiator, Campbell, objected, "I have a problem with injured people working on nights when temps are on days" and Kodluboy cautioned, "But we need to have capable people on all crews and injured people may need to be spread out on all crews." After a caucus, Kodluboy agreed to "T.A." Article 8.12 as quoted above.

By letter to Kodluboy dated April 20, 1995, Adams submitted revisions of certain articles, reflecting the parties' tentative agreements. The final paragraph of that letter states:

> The other follow up item for [Respondent] was to provide updated information regarding our view of the wage index concept; and also to provide language regarding verification of the indexed wage calculation. I expect to provide these within a day or two.

In fact, Adams did provide that information on the following day, by letter to Kodluboy dated April 21, 1995.

That letter sets up "an outline of our thoughts on how such a system might work, including the basis for the index and a procedure for verification of the wage adjustments that would be implemented under the system." Near its conclusion, the letter states that "any meaningful further progress on wages, and the other remaining economic issues, is largely contingent on demonstration by the Union that you are flexible on the subject of base wages." Indeed, Adams offered to meet separately with Kodluboy to thrash out that subject, before the May negotiating session. But, that offer went unaccepted.

T. Negotiations During May and June 1995

During the negotiating session on May 4, the Union submitted a document showing the fully loaded cost for the "General Labor" positions. Attached to it was a revised "Appendix 'A.'" That document revises the wage appendix of the Union's proposal of February 3, set forth in subsection R. It lowers the first three "Rates" of the "Operator Technician" job class—from $12.25 to $10.75 for rate 1, from $12.50 to $11.50 for rate 2, and from $12.75 to $12.25 for rate 3—and lowers all job class "Mechanic" rates: From $12.75 to $10.75 for rate 1, from $13 to $11.50 for rate 2, from $13.25 to $12.25 for rate 3, and from $13.50 to $13.00 for rate 4. It also strikes altogether the job class "Extruder Tech" and the rates applicable to that now stricken job class.

Facially, those reduced wage proposals appear to be significant concessions. However, their significance pales when two other facts are considered. First, during May, Respondent employed no employees who could be classified as "General Labor." People who would logically fall into that job class were only those clients of Cedar Valley Services and Express personnel who had worked "continuously in the plant for four (4) consecutive months," as provided by the draft collective-bargaining Agreement's section 3.03, quoted in subsection S.

Secondly, at the bottom of appendix "A" is the statement: "No active employee as of December 1, 1994 shall be classified less than Job Class 2, Rate 4 regardless of the job they perform." Of course, that encompasses all employees employed during May 1995 in the bargaining unit. In effect, appendix "A" continued to propose no more than a 12-cents-an-hour reduction in wages for unit employees.

In addition, appendix "A" also states: "This proposal takes into account that the indexing will be applied after the final rates have been set." Of course, if Langohr accurately reported what had been said to him on January 19, as set forth in subsection R, then wage rates could drop as much as $3 an hour if Respondent failed to achieve the target of 20-percent return on investment. But, if the Union meant what Kodluboy stated in his February 14 letter, also quoted in subsection R—"tied to an index of 10 percent rate of return as the base to retain close to present day wages with the rates of pay going up as we approach 20 percent rate of return"—then, in reality, wage increases were being proposed. Significantly, neither appendix "A," nor the two pages to which it was attached, specify a base rate.

During the discussion preceding distribution of those documents, Adams had answered affirmatively when Kodluboy asked whether Respondent was "looking for a $3.00 weighed average reduction of wages." After the lunchbreak, according to VanKampen's unchallenged notes, Adams distributed a "counter proposal on wages," saying:

> I wanted to get this back to you quickly because we both recognize that we can't get these a nickel at a time.
>
> We all understand here the big savings that are needed are in the operator class wages.
>
> Our position on General Labor is they are something we could always have filled through temporary help. You need to understand that with the new contract the [E]xpress people will at some point in time be put on [Respondent's] payroll!

Asked by Kodluboy, "So you don't agree with our handout," Adams answered, "We disagree with the $3.00 General Labor savings, and the $.60 raises not given." As that discussion progressed, Adams said, "We are not gong to make any meaningful movement in wages until we change the rate of pay operators get." When Kodluboy pointed out "that there are savings in benefits along with savings in wages for" Respondent, Adams replied, "Yes we understand that. That is why things like the 401(k) plan were changed to a 2 percent company contribution plan," and asked for "a significant move on wages so I have something to counter."

During the course of the negotiating session that day, Kodluboy mentioned, "I understand that you can't put all the restricted people on one shift," but added that those employees should not be barred from day-shift assignment if temporary workers were on one of those shifts.

Because Kodluboy became ill, the May 4 session ended somewhat abruptly. Later that same day Adams sent a letter to Kodluboy concerning "two questions which I would like to address briefly so that they do not result in any delay in the negotiating process":

> First you requested a "labor rate savings factor" for the general labor category. Savings of course can only be quantified relative to some reference point. Since your question did not specifically provide a context, strictly speaking the question can not be answered. However, in an attempt to be more responsive, if I were to infer the reference point that you are working from, the "savings" would be zero. This is because savings from the use of temporary help at reduced rates were already in [Respondent]'s baseline economic calculations since we had this right under the old employee agreement. Further, recall that we added Sub-article 3.03 to our contract proposal in response to your establishment of the "general labor" category. This will restrict our present ability to use lower paid temporary employees. Any "savings" generated relative to our baseline economics by the general labor rate would therefore be fully offset by the loss of "savings" under the current [Respondent] proposal.
>
> Second you requested a projection of the "possible impact for savings" under an LMPT program. [Respondent]'s position on this issue is that we can not quantify savings associated with unspecified future changes with unknown benefits; nor will we modify our economic assumptions based on such speculative savings. We are looking for hard dollar savings. LMPT is a process, not a solution in and of itself. The changes resulting from LMPT are evolutionary in nature; and we expect the practical effects to take many months and even years to become apparent.
>
> . . . .
>
> At the current time, the key issue in [Respondent]'s view remains the need for the Union to demonstrate meaningful flexibility on the issue of base wages for existing employees. For the foreseeable future, this is where the real money is; and we see no way of adequately addressing [Respondent]'s economic situation without making real progress in this area.

The next negotiating session occurred on May 8. When Kodluboy raised the issue of savings in the "General Labor" job class, Adams responded, "Since under the old agreement we always had the right to use temporary help, we have no gain from it now. We hold the position that we are only negotiating the cost savings from the existing employees. We are not considering any savings from future employees." Later, he said that Respondent "cannot meet its economic goals without having savings in the base wage of the Operators." Asked by Kodluboy about the 12 [cents] per hour reduction which the Union was proposing, Adams replied, "Yes, that's a start but we also made movement of $2 an hour as part of our counter. With the Lead people wages factored in at a 50¢ premium, this offsets the 12 [cent] reduction for the remaining employees."

When Kodluboy agreed that the Union was "considering lowering the amount of vacation and holidays," so long as it could "see dollar savings for what we are giving up," Adams asserted, "There is nothing you can change in the contract to offset the need to have a wage reduction in the Operator pay." Later he pointed out, "because the largest savings are in the Operator pay" and, as the discussion ensued, "it's hard to get where we need to be 5 [cents] at a time."

Eventually Kodluboy proposed eliminating altogether the 401k plan, night-shift premium, and three holidays, with the money thereby saved applied to the operator's wage rate. The parties adjourned to allow Adams to consider those proposals, with agreement to meet again on May 18. Later that same day, Adams sent two letters to Kodluboy. The first one addressed the negotiations:

> Attached is our counter-proposal based on our negotiations through 8 May. It incorporates the changes to the vacation and seniority articles as covered in my letter of 20 April. In addition, the following changes are included:
>
> - Update to the Wage Appendage
> - Addition of paid bereavement leave
> - Elimination of the matching requirement of 401k contributions
> - Modification of the Holiday Article to conform with your proposal

The attached "Wage Appendage" recites:

Job Class	Description	Rate 1	Rate 2	Rate 3	Rate 4
1	General Labor	$7.25	$7.36	$7.50	$7.75
2	Operator	8.00	8.50	9.00	10.00
3	Maintenance	10.00	10.50.	11.00	11.12
4	General Leader	n/a	11.00	11.50	12.50
5	Extruder Leader	n/a	11.50	12.00	13.00
6	Maintenance Leader	n/a	12.50	13.00	13.12

> Rate 1—Probationary
> Rate 2—End of probation to 1 year
> Rate 3—Over 1, less than 3 years
> Rate 4—Over 3 years
> Night shift premium shall be zero (0)cents per hour.
>
> No active employee as of 1 December 1994 shall be paid less than their rate at Job Class 2, regardless of the job class that they work in.
>
> Temporary summer help may be hired at locally competitive rates during the term of the Agreement without regard to the wage table above.

As to bereavement leave, section 14.04 of the May 8 counterproposal states: "The Company shall grant paid funeral

leave for the death of an employee's legal spouse, mother, father, son, or daughter for a maximum of three (3) scheduled shifts which extend over a period not to exceed three (3) calendar days. Pay shall be at straight time." The enclosed "Pension Appendage" provides, to the extent relevant: "The Company will continue to participate in the 401k plan with other Bridon Companies. Employees will not have to contribute to participate in the Plan. The Company will make a contribution of 2% of the employee's gross wages."

The second letter proposes a "global settlement" of all unfair labor practice issues and of all contractual subjects. The same wage appendage as quoted above is attached to it. The letter suggested that it be accepted along with "our counter offer dated 8 May." Kodluboy rejected both offers.

The May 18 negotiating session was highly charged. When he arrived, Kodluboy rejected Adams's proposed settlement. Adams said there was nothing more to discuss. Kodluboy asserted, "We have movement." Adams responded, "You moved 22 [cents]." Kodluboy retorted, "We gave up 3 holidays and the 401k plan." Mediator Bryant adjourned the parties to separate rooms, then met with each party separately.

After a half hour of separate meetings, Bryant told Respondent's officials that the Union wanted "a best and final offer for them to bring to the members for a vote." On that note, the session eventually adjourned.

By letter to Kodluboy dated May 22, 1995, Adams submitted Respondent's "last, best and final offer . . . in response to your request." The letter continues:

> The attached is the best offer that [Respondent] can make; and it is the final one which we will propose.
>
> [Respondent] wishes to make sure that there cannot be any misunderstanding on this point. The enclosed proposal is our last, best, and final offer. No other contract proposals will be forthcoming from [Respondent]. This proposal goes as far as [Respondent] is able to go.
>
> If the Union would like to meet regarding our last, best, and final proposal, on or before 29 May 1995, please let me know as soon as possible so that we can set up a meeting time. It is our hope that this proposal will be accepted, and that we will soon have a contract in place.

There is no evidence that the Union ever requested a meeting regarding that offer, as Adams offered to arrange.

No one contends that Respondent's offer did not incorporate accurately all tentative agreements reached by the parties during the course of almost a year's negotiations. Essentially, it is identical to the above-described May 8 counterproposal. However, adjustments were made in the wage appendage. In effect, those allowed for increased wage counterproposals in three of the four "Operator" job class rates, particularly an added 30 [cents] an hour rate for those in rate 4 of that job class:

Job Class	Description	Rate 1	Rate 2	Rate 3	Rate 4
1	General Labor	$7.25	$7.36	$7.50	$7.75
2	Operator	8.25	8.50	9.50	10.30
3	Maintenance	10.50	10.75	11.25	11.50
4	General Leader	n/a	10.70	11.70	12.50
5	Extruder Leader	n/a	11.20	12.20	13.00
6	Maintenance Leader	n/a	12.50	13.00	13.25

The remainder reads the same as the one attached to the letter from Adams to Kodluboy dated May 8, which is reproduced above.

It also should not pass without notice that the first paragraph of the "Health & Insurance Plan Appendage" states:

> The Company will continue the existing plans for at least ninety days. After that time it reserves the right to make changes in the administrator, insurance carriers, and other details of the plan; except that any changes in the plan shall provide generally similar coverage to the existing plan.

The insurance carrier, whose documents are attached to the "final offer" is Phoenix American Life Insurance.

By letter to Adams dated June 1, 1995, Kodluboy stated, "Please be advised that the members of Local Union 3842, your employees, have rejected your best and final offer and your settlement offer." No invitation to engage in further negotiations was made by Kodluboy. By return letter to him on that same date, Adams gave notice that:

> At the last negotiating session, May 18, 1995, the Union rejected [Respondent]'s proposal, did not present a counterproposal, but rather requested that [Respondent] provide the Union with a best and final offer. On May 22, 1995, in response to your request, [Respondent] provided you with its Last, Best, and Final Offer. [Respondent] offered to meet with the Union to review the proposal; the Union did not request such a meeting. Today we received your fax which states that the Union has rejected [Respondent]'s best and final offer. It is clear that we are now at impasse.
>
> As a result, [Respondent] will be implementing its Last, Best, and Final Offer, dated 22 May 1995, effective Monday, June 5, 1995. Please call me if you have any questions.

Kodluboy responded in a letter to Adams dated June 2, 1995. In pertinent part, the text of that letter states:

> I am in receipt of your letter dated June 1, 1995, and I find it very troubling. In that letter you state that "it is clear that we are now at impasse." Nothing could be further from the truth. The Union and [Respondent] at [sic] not at impasse for two distinct reasons.
>
> First, [Respondent] has engaged in a series of unfair labor practices during these contract negotiations. . . . The unfair labor practices committed by [Respondent] are unremedied. As you know, bargaining impasse cannot be reached where one party has violated its duty to bargain in good faith during contract negotiations. [Respondent]'s repeated violations of Section 8(a)(5) of the National Labor Relations Act has tainted the bargaining process and prevent the reaching of impasse.
>
> Second, even in the absence of [Respondent]'s unlawful conduct, the parties would not be at bargaining impasse because the Union is fully prepared to make movement in its negotiating position. We are prepared to modify our contract proposals and to move towards [Respondent]'s proposals in several outstanding bargaining topics. Along with our willingness to make bargaining movement, we remain willing to meet with you as soon as practicable.

Yet, at no point has the Union produced any proposals making a "movement in its negotiating position," nor has it presented to Respondent any modifications of its own contract proposals which would "move towards [Respondent]'s proposals in [any] outstanding bargaining topics."

U. Events From May Through Summer of 1995

Two of the paid holidays included in that Last, Best, and Final Offer were Memorial Day and Independence Day. On both holidays during 1995 the Albert Lea facility was shut down. Employees returned to work on May 30 and July 5, respectively. Nellis testified that, in the past, Respondent has always resumed production on the day following a holiday at 9 a.m., save for possibly once when production had resumed at 6 a.m. However, testified Nellis, prior to Memorial Day 1995 shift supervisors always polled employees to ascertain whether the majority of the latter wanted to start production before 9 a.m., as early as 6 a.m., on the day after a holiday. But, that practice was not followed with respect to Memorial Day and Independence Day 1995; Respondent simply announced that production would restart at 9 a.m. on May 30 and, again on July 5.

No other employees corroborated Nellis who, as concluded in subsection A, was not a credible witness. Yet, when asked about practice regarding the startup after holidays, VanKampen testified in a manner that tended to corroborate the start-time time practice testimony by Nellis.

He testified initially that, after holidays, Respondent resumed operations, "Normally anywhere from 8 o'clock—9 o'clock. Occasionally 6 o'clock. It depends on the needs of [Respondent]." Still, he allowed that, "[w]e will sample the crews occasionally to see what times they'd want to start up and go off of that," by having "the supervisor take an informal poll," although employee preference was never permitted to override business considerations as to when production should be restarted.

VanKampen acknowledged that, except for two employees who "had to come in two hours early to turn on extrusion heats," Respondent had scheduled restart at 8 or 9 a.m. on May 30. The same occurred on July 5. He explained that those decisions had been made on the basis that production did not need to be restarted any earlier. As to why Respondent had not polled employees about those decisions, VanKampen testified:

> Well, there were charges against us, the [U]nion did, and I guess I was trying to avoid contact—too much contact with the employees on issues such as that. In the past the majority of the employees always wanted either an 8 or 9 o'clock start-up so I went with what I thought the majority would want without—trying not to cause any controversy.

He admitted that he never gave notice to the Union before informing employees of the startup times on either day. On the other hand, VanKampen testified employees had been informed of the May 31 startup time on Friday, May 26, but no one had requested bargaining about it. Nor did anyone do so when informed of the startup time on July 5.

The General Counsel alleges that the change in practice for determining startup time after holiday shutdowns constituted a unilateral change which violated Section 8(a)(5) and (1) of the Act. An identical allegation is alleged with regard to another change made during June.

As quoted in subsection T, the "Health & Insurance Plan Appendage" of Respondent's Last, Best, and Final Offer specifies that Respondent "will continue the existing plans for at least ninety days" and, only afterward "reserves the right to make changes in the . . . insurance carriers." Respondent admits that, during June, it changed insurance carrier, from Phoenix American Life Insurance Company to Guardian Group Insurance. It does not deny that it did so without first having given notice to the Union.

Asked why Respondent had changed carrier, Adams answered, "Actually I don't know. I'm not sure on whether that's made by the insurance group in Wilkes-Barre or by one insurance person up here." There is no evidence that the change in carrier effected any change in terms of insurance coverage then provided to unit employees. Still, Respondent did not explain why it had disregarded the above-quoted appendage term of its own Last, Best, and Final Offer so soon after having implemented it.

The General Counsel further alleges that Respondent violated Section 8(a)(5) and (1) of the Act, during June or July, by bypassing the Union and dealing directly with employees concerning preferences for hours of work, schedules, and shifts. Item 13 of section 3.02 of Respondent's Last, Best, and Final Offer provides that Respondent retains the right "To determine the number of hours per day or week that operations are to be carried on, subject to the terms of this Agreement." Section 16.01 of that offer states:

> *Work Week*: Forty (40) hours per week shall constitute a standard week's work. Shift schedules are for twelve (12) hour days and alternating forty eight (48) and (36) hour weeks or for such other schedules as might be mutually agreed to by the parties. Four (4) separate shifts shall be established to carry out this schedule. A fifth shift may be added covering employees working eight (8) hour shifts.

Nellis testified that, during June, he had been given a "SCHEDULE SURVEY" by Shift Supervisor Wade Carlson. According to Nellis, Carlson said, "[W]e were to fill them out and put them in—there was a folder attached to the door that lead into one of the offices in the lunchroom and that—to fill them out and to drop them into that folder." Nellis further testified that he had seen other employees with copies of that survey in their hands. But, no other employees testified to having received a copy of the survey from a supervisor. And no other employee testified to having been directed by a supervisor to fill out one of the surveys.

The survey form asked five questions: "What is the maximum number of hours you would like to work in one week?"; "What is the minimum number of hours you would like to work in one week?"; "What length of shift would you prefer? 12 hours? 8 hours? less? If less, how many?"; "Would you like a combination of different length shifts? Some 12s and some 8s for example?"; and, "Do you like your schedule just the way it is with no changes?" Below is space for "Comments/Suggestions":

Respondent denies that it sponsored or promoted the survey. To understand its defense, it is necessary to revisit some aspects of practice and of the negotiations. In its original proposal, discussed in subsection M, supra, the Union proposed:

> *Section 13.02 - Safety Committee* There shall be a Safety Committee of at least four (4) employees selected by the Union members in the shop and this committee will work

> in conjunction with the management Safety Committee for the promotion of welfare and safety of the workers in the shop. The committee is to meet a minimum of once a month with minutes of the meeting to be distributed to the union committee. It shall be the duty of all employees to report to the management any hazards or other things that are detrimental to the safety and welfare of the workers.

Respondent's original counterproposal, described in that same subsection, made no mention of a safety committee. However, by December Respondent had essentially agreed to the Union's safety committee proposal. Thus, section 15.03 of the latest revised counterproposal, described in subsection Q, supra, states:

> There shall be a Safety Committee of four (4) employees elected by the members of the Union and this Committee will work in conjunction with management for the promotion of the welfare and safety of the workers. The Committee is to meet a minimum of once a month with minutes of the meeting to be distributed to the Grievance Committee. It shall be the duty of all employees to report to the management any hazards or other things that are detrimental to the safety and welfare of the workers.

That provision was carried forward during subsequent negotiations. It appears in the Last, Best, and Final Offer, with one sentence added: "There shall be a monthly safety tour with a representative of the Company and the Union's Safety Committee Chairperson."

Nellis acknowledged that the safety committee existed during June and July. He testified that each shift elected a representative to it. Moreover, Nellis testified that "Bonnie Anderson [represents] our shift[.]"

According to Bonnie Anderson, during June, Kevin Miland, Respondent's human resources manager, had been "head of the safety committee." Ramona Anderson, a self-employed nursing consultant retained by Respondent to, inter alia, "deal with safety training or coordinating safety training and health and safety issues to comply with OSHA," also had attended the June safety committee meeting. She testified that she tries to regularly attend those monthly meetings.

Bonnie Anderson testified that, as people were leaving the June safety meeting, Ramona Anderson had handed copies of the survey to employee members. "She asked us if we'd hand these out for a survey because she was at a seminar, and she wanted the interest of the people," testified Bonnie Anderson, and, "if [employees] wanted to fill them out and had any interest in them to hand them back to us or stick them in that envelope," which was posted on the door of the human resources office.

Ramona Anderson testified that she uses that office whenever she is working at the Albert Lea facility. Bonnie Anderson testified that Ramona Anderson "had an envelope on her door," and it had been into that envelope that employees were to place completed surveys.

As to the purpose of the survey, Ramona Anderson testified that she had attended a meeting of the Minnesota State Safety and Health Conference during May. One issue covered there had been the affect on employees of shift lengths. After that meeting, she testified, she had prepared the survey "to kind of get a feel of what [Respondent's] employees were wanting as far as shifts" and, "Each of the members from the committee were [sic] to take it back to their [sic] crew" for distribution. She denied that anyone from Respondent's management had instructed her to prepare and distribute the survey.

Ramona Anderson also denied that employees had been expected or required to complete copies of the survey. In that regard, Bonnie Anderson—the safety committee representative for the shift on which Nellis works—testified, "I handed out two [survey forms]. The other ones I put on the table because my shift was over after we got done with that meeting."

The final incident at issue in the instant proceeding is one occurring during August. Without prior notice to the Union and without affording it an opportunity to bargain, Respondent revised its evaluation system and implemented that revision, thereby giving rise to another alleged violation of Section 8(a)(5) and (1) of the Act. There is no dispute about the facts leading to that allegation.

The evaluation system implemented by Respondent during June 1994 is described in subsection N, supra. VanKampen testified that the monthly form completed by supervisors—assigning outstanding, above average, average, below average, or unsatisfactory evaluations in each of five categories—had been "real generic"—that is, "purchased out of a book." He testified that Human Resources Manager Miland had "revamped it to be more specific to jobs that people were actually performing," so that the evaluation form would be "more understandable and . . . accurate." "The forms were revised to more specifically reflect what people do in certain job classifications," testified VanKampen.

Respondent concedes that it never gave notice of the change to the Union. However, it argues that any change resulting from substitution of the new form "was not a material, substantial, and significant change to the terms and conditions of employment," inasmuch as, "The only thing that was changed . . . was the phrases used to describe[ ] performance." To be sure, the same five area—Quantity of Work, Quality of Work, Knowledge of Job, Dependability and Working Relations—are retained.

Other aspects of the monthly evaluation form, however, were changed. The ratings of Outstanding, Above Average, etc. are replaced by numerical ratings: "1," "2," etc. Moreover, the evaluation descriptions for each category are changed, as Miland probably intended.

For example, the 1994 form listed "Quality of Work Consider the ability and accuracy to produce accepted work which meets company standards, neatness." That same factor on the 1995 form is headed: "QUALITY OF WORK Accuracy, Neatness, i.e. Spool Weights, Housekeeping." Under that heading, an employee was rated "Unsatisfactory" in the 1994 form if he/she "Makes excessive and repetitive mistakes. Cannot be given work requiring accuracy." Under the 1995 form, a rating of "1" is given for, "Makes too many mistakes. Causes excess rework."

Under "Dependability Consider amount of supervision required, punctuality and attendance" from the 1994 form, an employees is rated "Below Average" if he/she, "Requires more than normal supervision. Lacks initiative. Is easily distracted. Absent or tardy rather frequently, sometimes forgets to report in." Under the 1995 form, the factor being rated is "DEPENDABILITY Attendance, Adherence to Breaks." An employee receives a "2" if, according to the form, "Breaks are too long." Prior to mid-1995, an employee received an "Outstanding" in the category of "Working Relations Consider willingness to work with and help others, ability to accept con-

structive criticism, attitude, and cooperativeness with fellow employees and supervisors" if that employee was, "Tactful and courteous. Very effective in dealing with co-workers. Does full share in department. Loyal worker." After mid-1995, in the category of "WORKING RELATIONS Attitude, Cooperation," that employee received a "5" rating for being "Courteous and effective."

II. DISCUSSION

It is difficult to escape the general conclusion that if Respondent had been engaging in improper bargaining, it did so no less than did the Union. Although both sides sent letters after the election seeking immediate commencement of negotiations, as described in section I,L, supra, Kodluboy appeared to be avoiding meeting during May, as a prelude to beginning negotiations. Thus, he initially was not available to take Adams's telephone calls to the Union. He did not appear for the scheduled May 13 luncheon meeting. He failed to keep his promise to contact Adams about meeting 1 week later. As a result, commencement of negotiations was delayed for over a month after the Union had prevailed in the representation election.

Nor was commencement of negotiations the only delay in negotiations caused by the Union. As set forth in section I,N, supra, it had been the Union which canceled a July meeting. Moreover, while it had been Mediator Langohr who suspended negotiations during August, as discussed in section I,O, supra, it is undisputed that it had been the Union which was not available to negotiate during September until almost the last day of that month. Not only was the plant tour of November 28 canceled, as described in section I,P, supra, but so, also, was the negotiating session scheduled for that same day, because Kodluboy failed to appear in Albert Lea where Adams and Langohr were waiting for him. It is uncontradicted that more intensive negotiating did not occur during March 1995, because Kodluboy had been unavailable to meet more frequently during that month.

To be sure, no single instance of failing to meet for negotiations can be said to conclusively establish an improper failure to diligently pursue bargaining. Collectively, however, the Union's periodic failures to be available to meet with Respondent do add up to somewhat of a pattern of inattention to the obligations of the bargaining process. Further, Kodluboy's sometimes specious and conflicting explanations for failing to meet for negotiations—especially during May, as discussed in section I,L, supra, and on November 28, as described in section I,P, supra,—reinforce an appearance of cavalier attitude to the statutory obligation to diligently bargain. These facts also tend to sow seeds of distrust as to the believability of what the Union was doing and telling Respondent.

Given that background, it is not surprising that, as discussed in sections I,S, and T, supra, during the late winter and spring of 1995, Adams because distrustful of the Union's true intentions concerning indexing. Indeed, after appearing to be proposing a base wage pegged to a 20-percent return on average capital employed, the Union subsequently began talking about a base wage tied to a 10-percent return rate. Of course, such a switch would mean that Respondent would be awarding wage increases to achieve the 20-percent return target which, it never was disputed, wage reductions were needed to achieve. At no point did the Union produce any calculations contradicting that analysis and conclusion by Respondent.

With specific respect to that subject, there can be no doubt that the Union had been placed in a difficult situation when it became representative of Respondent's Albert Lea production and maintenance employees. As set forth in sections I,J, and K, supra, by then, those employees had been informed that Respondent would be trying to lower costs, with the result that they would be suffering wage, and probably benefits, reductions. Indeed, they likely selected the Union as their bargaining agent to resist any reductions. In consequence, the Union was confronted with having to conduct a holding action—with having to bargain against counterproposals arising from what Respondent's parent company deemed an unsatisfactory economic situation.

Of course, the Union had every right under the Act to formulate proposals—even to strike—to try preventing, if possible, wage and benefit reductions. Still, Respondent had no less a statutory right to propose concessions in those areas, as discussed in section I,A, supra. Both parties were obliged only to attempt compromising their positions so that, if possible, agreement could be achieved at some point. Yet, the evidence shows that although Respondent satisfied that obligation, the Union did not.

Respondent's originally proposed Wage Appendage, quoted in section I,M, supra, proposed rates which, if accepted, would have substantially reduced wages at Albert Lea. Moreover, as negotiations progressed, it did appear that Adams attempted to justify those reductions by referring to differing economic concepts: wage levels needed to achieve a particular annual return on Bridon Group's average capital employed, wage levels needed to allow twine prices to be reduced to competitive levels, wage levels being paid by competitors, wage levels being paid in the Albert Lea area, wage levels being paid to employees working at the Jerome facility. But, when the evidence concerning discussion about those concepts is examined and compared, any facial impropriety evaporates.

Throughout the 3-year period encompassed by the facts set forth in section I, supra, and through the approximately 1 year of negotiations, Respondent never abandoned its single, ultimate goal of achieving a 20-percent annual return on Bridon Group's average capital employed. The other concepts—wage levels needed to reduce prices, industry wage levels, area wage levels, Jerome wages—were introduced by Adams to justify and secure employees and, thus, union-acceptance of labor cost reductions which Respondent believed were needed to achieve the 20-percent return target. For example, the levels to which wages would be reduced still would leave employees at no lower level than wages of employees in the industry, or of employees in the Albert Lea area, or of employees working at Jerome.

To be sure, Respondent's initial wage counterproposal represented probably a greater reduction than Respondent needed to achieve that 20-percent target. Nonetheless, that counterproposal was made as part of the process of collective bargaining. That process inherently contemplates give-and-take, proposal-and-counterproposal. The Act does not oblige parties to make their last and final offers at the very beginning of negotiations—does not oblige them to avoid making proposals which would leave them room to negotiate and compromise toward what, in reality, are their true "bottom line" goals. That, in essence, is what Adams testified that he had been doing, as set forth in section I,M, supra.

Furthermore, as also described in that same section, Adams pointed out that he had formulated Respondent's initial counterproposal in light of the Union's initial proposal. "Substantial wage increases" were included in the latter's initial proposal. Nellis testified that, despite that proposal, the Union really had been seeking only a wage freeze, not increases, much less "Substantial" ones. Yet, if Respondent is to be criticized for making a wage proposal lower than it was willing to ultimately accept, then it engaged in conduct no different than the Union's conduct in making a wage proposal seeking more than it admittedly had been willing to accept. The one party followed a course no different than the other. If one is to be criticized for doing so, so also must the other party suffer criticism.

In point of fact, whatever its initial wage counterproposal, over the course of the succeeding almost 1-year period, Respondent progressively raised its level of wages being counterproposed, in an effort to compromise with the Union. As it turned out, for both parties the significant rate became "Rate 4" of the Operator "Job Class." That is, as negotiations progressed, both parties arrived at the position, albeit from differing directions, that wages of already employed production and maintenance employees should not decline below that rate for that job class, as shown by the provision at the bottom of the Union's "APPENDIX 'A"' to its proposal of February 3, 1995, quoted in section I,S, supra, and by Respondent's Wage Appendage to its Draft Collective-Bargaining Agreement, quoted in section I,S, supra, as well of its Last, Best, and Final Offer, reproduced in section I,T, supra.

As to the rate for that job class, Respondent increased its counterproposal over the course of negotiations: from $8.50 an hour in its original proposal, set forth in section I,M, supra, to $9.71 an hour in the above-mentioned Draft Collective-Bargaining Agreement, and, ultimately, to $10.30 an hour in its above-mentioned Last, Best, and Final Offer. Interestingly, that final figure amounts to a little less wage reduction than the $3-per-hour reduction, from the $13.12 an hour wage rate that Albert Lea production and maintenance employees has been receiving at commencement of negotiations, which Adams mentioned periodically to the Union, throughout negotiations, as an acceptable amount for wage reductions.

In contrast, the Union hardly budged from its objective of preserving wage levels for already employed Albert Lea employees. Obviously, reduction was not contemplated by its initial proposal for "Substantial wage increases." Indeed, that is hardly a legitimate proposal, since it is so vague and indefinite as to be meaningless. Were an employer to propose "substantial wage decreases," such a proposal would likely be construed as, at least, an indicia of bad-faith bargaining under the Act.

I do not credit the unsupported testimony of Nellis, described in section I,M, supra, that Respondent was told, during the negotiating session of June 15, 1994, that, in effect, "Substantial wage increases" was not being proposed seriously. Indeed, were that true, good-faith bargaining is hardly promoted by meaningless proposals which are not seriously intended. As bargaining progressed, it appeared that the Union was using that proposal as a bargaining ploy to allow its subsequent "wage freeze" to be treated as a concessionary offer.

In reality, aside from an eventual 12-cent-an-hour concession, the Union was unwilling to yield any meaningful concession in existing employees' wage rate. And Kodluboy based the Union's unwillingness to make such concessions on union policy which forbade the Union from agreeing to concessions with profitable employers. True, the Act allows labor organizations to take and maintain positions opposing concessionary proposals from employers. By the same token, however, the Act allows employers to seek concessions and to adhere to that search throughout negotiations. The one cannot be condemned for what is allowed to the other and if the Union's eventual 12-cent-an-hour movement in its position is construed as significant, so too must Respondent $1.80 movement in its operator rate 4 counterproposals be regarded as significant.

Still, in the face of Respondent's substantial movement in wage counterproposals, the Union's mere 12-cent-an-hour concession is minimal on its face. Of course, the Union did offer concessions in other areas: pension, health coverage, sick pay, etc. Yet, while the Union occasionally claimed during negotiations that its concessions added up to large amounts of savings for Respondent, it never supported those generalized claims with more specific calculations showing that such claimed savings equaled or even approached the savings resulting from wage reductions under Respondent's calculations.

Kodluboy claimed that the Union could not support its proposed benefits concessions, because Geisler was not given complete or accurate information by Respondent. But, this seems to have been just another ploy. Geisler was never called to give firsthand testimony about information requested and provided by Respondent. There is no allegation that Respondent ever unlawfully failed to provide information which he had requested. And particularized evidence was not presented during the instant proceeding, where the General Counsel had the benefit of subpoena power to compel production of information by Respondent, to show that the Union's alternative proposals, in fact, did achieve savings for Respondent comparable to those which a wage reduction would attain.

Based upon the evidence, there is no objective basis for inferring that total savings from the Union's proposals added up to the total savings sought by Respondent to satisfy Bridon Group's 20-percent annual return target. To be sure, one could criticize Bridon Group for expecting so large a return, in effect, at the expense of Respondent's employees. But, as set forth in section I,A, supra, the Supreme Court has repeatedly told the Board, and its administrative law judges, not to engage in that type of subjective analysis of bargaining positions. As a result, in evaluating the lawfulness of bargaining, the Board has disavowed expressly any intention to "scrutinize wage offers to see if they are sufficiently generous, [and to] require some substantial explanation for every concession that an employer declines to make." *Prentice-Hall, Inc*., supra, 290 NLRB at 646.

It is accurate that the Union's indexing concept initially appeared to provide an avenue along which the parties might travel to secure the wage reductions sought by Respondent. And, as set forth in section I,R, supra, Adams reacted favorably to that proposal. He said during negotiations that it was an approach worth pursuing. He did so, by preparing and submitting to the Union a series of calculations showing how indexing could be implemented. Thereafter, however, the Union began vacillating concerning its own indexing idea—first presenting a proposal which set out wage rates with no mention of indexing, then claiming that it truly was proposing indexing but at a base rate which preserved existing wage rates and would award significant increases for the 20-percent annual return target (even though it is undisputed that, in reality, reductions from existing wage rates were needed to attain that target), and, finally, pro-

posing a wage table which set out specific wage rates and merely paid lip-service to indexing, in a single line at the bottom of that table.

In sum, an examination of these negotiations give rise to a substantial inference that the Union had not been willing to negotiate at all about wage concessions for employees already working at Respondent's Albert Lea facility. Although the Act permits labor organizations to resist concessions, they are still obliged to make meaningful efforts to try to achieve compromises with employers about concessionary proposals. The Union's position in the instant case was based upon general union policy: that wage concessions were absolutely not to be accorded to profitable employers. Inasmuch as it knew that Respondent was profitable—was not claiming inability to continue paying existing rates—the Union's related demand to examine Respondent's books, before negotiating about concessions in wages, was improper. *AMF Bowling Co. v. NLRB*, 63 F.3d 1293, 1301 (4th Cir. 1995)

Furthermore, it is a fair inference that, contrary to its denials, the Union had been trying to string out negotiations for no reason other than to avoid the result that ultimately did occur in May and June 1995: Respondent made a last, best, and final offer which it implemented, following rejection by the unit employees. Thus, during 1994, the Union delayed initially meeting with Respondent until 1 month of the 12-month certification year had elapsed, it canceled one scheduled negotiating session and failed to appear for another one, it delayed meeting during September. Through most of 1994, the Union engaged in piecemeal or fragmented bargaining, by refusing to discuss "economics" before complete resolution of "language" issues. During 1995 it was unwilling to meet continuously during March to try narrowing, if not resolving altogether, issues separating the parties.

As mentioned in section I,N, supra, in connection with Kodluboy's July premature questioning about whether the Union's proposals were "dead," it appeared that he was engaging in an ongoing campaign, at least during 1994, to locate, if not create, unfair labor practices by Respondent which, in turn, could be wielded as a sword to block implementation of any last and final offer by Respondent. Thus, while he periodically complained during 1994 about specific events at the Albert Lea facility—laid-off employees who were not being recalled, supervisors performing unit work, contract labor working there—he never actually requested bargaining about those specific situations. Indeed, he hardly could have done so, given the Union's improper piecemeal or fragmented overall negotiating approach. Similarly, when Respondent attempted to discuss the effects of possible work relocation to Jerome, Kodluboy claimed that he was being threatened, avoided discussion of that legitimate bargaining consideration, and ultimately refused outright to discuss it.

This improper procedure reached its apex during May 1995. As set forth in section I,T, supra, the Union demanded a last and final offer from Respondent. Aside from what that phrase ordinarily implies in common parlance, in the field of labor negotiations a "last and final offer" is a term of art: the "bottom line," the ultimate position beyond which the employer will go no further. Having received that requested offer, the Union made no effort to meet further with Respondent before presenting it to the employees, though Adams offered to do so in his letter transmitting the offer. Then, when the employees rejected it, and after Respondent predictably implemented the offer, Kodluboy responded with generalized and unparticularized offers to negotiate further.

Kodluboy is an experienced negotiator. He surely should have known that implementation ordinarily follows rejection of a last and final offer. But, he continued trying to avoid any wage reductions, pursuant to implementation of Respondent's Last, Best, and Final Offer. He did so by ignoring the inherent implication of his own request for a last and final offer, and by seeking to resume negotiations as if that offer never had been demanded and supplied.

There is no evidence of changed circumstances between the time that the Union sought a last and final offer from Respondent and, on the other hand, the time Respondent announced implementation of it. Further, there is no evidence during June 1995, or afterward, of specific revised proposals being made by the Union—ones which might have warranted resumption of negotiations. To the contrary, although Kodluboy's letter suggested generally that areas for continued negotiation existed, he never so much as identified any one of them. Instead, the Union continued to assert that Respondent's unfair labor practices precluded implementation of a last and final offer. In short, the Union's offer to resume bargaining during June 1995 appeared to be no more than another ploy aimed at staving off wage reductions for employees working for Respondent at Albert Lea. There is no basis for concluding that it had been a genuine attempt to kick-start negotiations.

I conclude that Respondent did not violate the Act by implementing its Last, Best, and Final Offer. Its bargaining was not perfect. But, throughout it displayed a genuine effort to try reaching agreement with the Union, within the framework of the economic situation facing it. Its analysis of that situation may not have been one hundred percent accurate. Its corrective measures may not have been the best solutions. However, a preponderance of the credible evidence shows that it made an honest attempt to bargain about long-contemplated corrective measures for even longer-recognized economic problems. Had the Union been equally willing to bargain meaningfully about them, it might have been able to more clearly focus whatever deficiencies existed in Respondent's analysis of its situation and of the adequacy of contemplated alternative corrective courses. Because it did not do so, the good faith of Respondent in being willing to substitute less onerous corrective solutions was never able to be tested.

With regard to its substantive counterproposals, Respondent did initially propose revisions of the certified unit description, no union security or checkoff, broad management rights, and substantial wage and benefits reductions. In some situations, proposals of that nature might, on their face, evidence bad faith bargaining. Still, as the cases in section I,A, supra, show, such a conclusion does not follow in every situation.

Parties are allowed to bargain about revising unit descriptions, even ones embodied in Board certifications. Employers are not obliged by the Act to propose, nor even agree to, union-security and checkoff contractual provisions. Initial proposals for broad management rights provisions are not per se unlawful. And, of course, the Act does not bar proposals for wage and benefits concessions. In each instance, the true focus of analysis regarding such proposals, as well as others, is on explanations advanced for such proposals and, more importantly, upon the extent to which an employer is willing to negotiate about them.

With respect to the unit description, as set forth in section I,M, supra, Respondent had included "technical employees" as a unit exclusion because it had hired a chemist and, in consequence, wanted to be certain of exclusion from the unit of him and of any similar personnel whom Respondent might hire. For all of its protesting about that unit change, the Union never seemed to contest exclusion from the unit of personnel such as the chemist. In fact, its protests, and the unreliable testimony which it advanced in connection with them, seemed to have been no more than another feigned effort to make it appear that Respondent had been failing to bargain in good faith, so that wage and benefits reductions could be avoided.

Having encouraged its Albert Lea production and maintenance employees to become represented, as discussed in sections I,J, and K, supra, there is no objective basis for concluding that, during June 1994, Respondent suddenly decided to exclude some of those same employees from the representation which it had encouraged them to obtain. No advantage to Respondent, by doing so, is suggested by the record. In any event, Respondent ultimately abandoned its effort to add "technical employees" to the unit's exclusions, without bargaining to impasse about that subject.

Similarly, as described in section I,P, supra, Respondent abandoned its initial opposition to union security and checkoff. Even if it truly had done so to enhance its position in any subsequent unfair labor practice proceeding, it had not acted unlawfully by its initial proposals concerning those subjects. More importantly, there is no evidence whatsoever that it had bargained to impasse concerning either subject.

Much is made of the testimony that union security and checkoff, as well as a number of other subjects, had been declared by Johnson as "nonnegotiable" on June 30, 1994, as discussed in section I,M, supra. But, as set forth there, I do not credit that testimony.

Even if Johnson had made such a statement on one occasion, there is no evidence that Respondent ever followed through on it after June 30, 1994,—no evidence that the Union ever made an effort to test a purported "nonnegotiable" assertion, by trying afterward to negotiate about one or more of those subjects and by being rebuffed in that effort, with responses of nonnegotiability. Consequently, even had Johnson made such a one-time statement, to infer an overall refusal to bargain on the basis of that single remark would be to "lend too close an ear to the bluster and banter of negotiations," thereby "frustrat[ing] the Act's strong policy of fostering free and open communications between the parties." *Allbritton Communications*, 271 NLRB 201, 206 (1984). See discussion *Hayward Dodge*, 292 NLRB 434, 466 (1989).

With regard to management rights, as shown in sections I,P, Q, and S, supra, Respondent made ongoing revisions to its initial counterproposal on that subject. It is uncontroverted that those revisions benefited the Union's positions and had been made in response to those positions. By the time of its Last, Best, and Final Offer, Respondent had agreed to significant changes from its initial counterproposal concerning management rights. Moreover, it appears undisputed that the Union seemed agreeable to that article as it appears in the Last, Best, and Final Offer. In short, there is no basis for inferring bad-faith bargaining, nor intent to engage in it, from the management-rights counterproposal and negotiations about it.

As set forth in section I,A, supra, an employer does not violate the Act, nor evidence bad-faith bargaining, merely by proposing wage and benefit concessions. It is difficult to accuse Respondent of bad-faith bargaining about concessions, given the Union's own initially vague wage proposal—"Substantial wage increases"—and its subsequent 6-month fragmented bargaining approach—that "language" issues must be resolved before negotiating about "economics." Still, Respondent did make an ongoing effort to discuss wage and benefit concessions. Moreover, it made periodic revisions in its wage appendages—especially to job class 2, rate 4—so that it sought progressively less concession in wages from June 1994 through June 1995. Those facts hardly demonstrate inflexibility toward consideration of the magnitude of wage concessions. And, of course, Respondent also made revisions, over the course of that 1-year period, in its other economic proposals, such as concerning vacations.

Significantly, once the Union did appear willing to negotiate about wages and proposed indexing, as described in section I,R, supra, Respondent not only was interested in pursuing that avenue, but Adams prepared considerable documentation to negotiate further about how such a program would operate. Apparently, those documents revealed to the Union that it would not be able to achieve its own predetermined wage position—a freeze—through indexing. So, while it continued paying lip-service to that concept, the Union largely abandoned indexing as an alternative means of determining wage rates. Yet, Respondent's willingness to consider indexing, and its efforts to negotiate meaningfully about it, tend to diminish any ultimate conclusion that Respondent had been negotiating inflexibly concerning wage concessions.

So, also, does the fact that Respondent had been willing to listen to and consider the Union's suggestion that benefits reductions be substituted for wage reductions. The problem with such an alternative approach proved to be that the Union was not able to show how benefits concessions would achieve the extent of savings, which Respondent had determined was needed from wage reductions, to restore competitiveness and attain the annual return percentage demanded by Bridon Group. Indeed, review of the overall negotiations about that union-suggested alternative tends to show that Kodluboy had merely been shooting from the hip about the comparability of savings which could be achieved. At no point has the Union demonstrated with particularity that its alternative benefits reduction proposals had been even anywhere near comparable to the savings which could be achieved by wage reductions under Respondent's counterproposals.

One event that ordinarily would violate the Act is declaration of impasse on, and implementation of, a single proposal made during negotiations, without an overall impasse having been reached. Such conduct is one manifestation of fragmented or piecemeal bargaining which, as discussed in section I,A, supra, constitutes bad-faith bargaining.

In declaring impasse on wages during December, and announcing that its wage proposal of that month would be implemented, Respondent ordinarily would have violated Section 8(a)(5) and (1) of the Act. Yet, certain other considerations must be evaluated in connection with that conduct, before reaching such an ultimate conclusion.

Since the preceding June the Union, itself, had been engaging in fragmented bargaining, by refusing to negotiate about "economics" until resolution of "language" issues. In doing so, the Union effectively had been blocking bargaining in an area of importance to Respondent, as well as in an area that ordinar-

ily is the most significant in any negotiations. If nothing else, the Union's ongoing refusal to negotiate about economics was "excluding the opportunity to engage in the kind of 'horse trading' or 'give-and-take' that characterizes good faith bargaining." *Endo Laboratories*, supra, 239 NLRB 1074. And, it creates a situation where an employer is allowed to implement a partial impasse. *Bottom Line Enterprises*, supra, 302 NLRB 373.

Furthermore, the Union had obdurately opposed bargaining about concessions until Respondent first opened its books for union inspection. Inasmuch as Respondent was not claiming financial inability to continue paying existing wage and benefits, and since the Union's position was based upon general union policy, the Union had been engaging in improper bargaining, to the limited extent that it did discuss economics during negotiations. *AMF Bowling Co. v. NLRB*, supra. In these circumstances, it is difficult to conclude that Respondent's declaration of partial impasse, and announced intention to implement its then-last wage counterproposal, had violated Section 8(a)(5) and (1) of the Act.

In any event, as described in section I,R, supra, Respondent never did implement that wage counterproposal. When the Union's communications led Respondent to believe, at least, that the Union would negotiate about economics, Respondent withdrew its implementation announcement and resumed bargaining, without ever changing wage rates. Such conduct is consistent with its argument that it had announced the partial impasse, and its intention to implement its then-existing counteroffer, because the Union was refusing to bargain about economics and was not doing so, to the extent which it did, in good faith. Respondent's willingness to return to the bargaining table, after hearing from the Union, tends to support, rather than detract from, a conclusion that Respondent wanted to negotiate about mandatory subjects of bargaining, rather than evade its obligation to do so.

Beyond that, there is no evidence that Respondent's December partial impasse declaration had any adverse effect whatsoever on the course of negotiations during 1995. Most specifically, there is no evidence that it had any effect on the events which led to Respondent's Last, Best, and Final Offer, nor on implementation of it. A single unfair labor practice will not forever more taint bargaining where a party corrects its impropriety and, thereafter, bargains without repeating it. In the circumstances presented here, however, I conclude that Respondent's declaration of partial impasse during December 1994 did not violate Section 8(a)(5) and (1) of the Act.

Nor did Respondent's references to such matters as the possibility of relocating production to Jerome and of contracting out unit work, if it was unable to reach agreement on concessions. The evidence shows that, even before the Union became the representative of Albert Lea employees, those corrective courses had been firmly decided upon if Respondent could not lower labor costs there—costs which exceeded those of competitors and in the area. During negotiations, Respondent did no more than inform the Union of that eventuality. If it had not done so, Respondent could fairly had been charged with not having provided information which a bargaining agent would need to bargain intelligently—bargain with full knowledge of all the facts pertinent to its negotiating posture.

Furthermore, Respondent made a genuine effort to try reaching agreement, or at least negotiating, about reductions that would avoid work relocation or contracting out. If its officials sometimes became strident about those alternative corrective courses, their stridency appears less a matter of trying to threaten or "blackmail" the Union, and more an effort to persuade Kodluboy to address the subjects encompassed by "economics" which the Union was refusing to negotiate about. In these circumstances, Respondent's references to alternative corrective courses, if agreement could not be reached for reductions, did not constitute a violation of Section 8(a)(5) and (1) of the Act, nor did they evidence a "take-it-or-leave-it" attitude by Respondent during negotiations.

Nor are such conclusions warranted by review of the credible evidence concerning the manner in which Respondent negotiated about those counterproposals. Respondent was willing to listen to the Union's positions. It did modify counterproposals to accommodate some of the Union's arguments. Respondent provided explanations and justifications for its own modified proposals and for positions challenged by the Union. Those explanations and justifications corresponded to the situation in which Respondent found itself and to events and discussions during 1992, 1993, and early 1994.

As to the most important subject—wages—Respondent's explanations have not been shown to have been improbable. To the contrary, there is no dispute that Albert Lea wages had been higher than those paid by Respondent's competitors and by other employers in the Albert Lea area. Nor is it disputed that those higher labor costs made it impossible for Respondent to lower prices sufficiently to be fully competitive in all areas of the twine market.

In contrast, the Union relied upon a general union policy as the basis for refusing even to negotiate about concessions. When it ultimately did address concessions, it appeared to be attempting to disguise perpetuation of its ongoing refusal to negotiate about anything other than a freeze. Its offers for alternative concessions, in other areas, have not been shown to add up to the total reduction level which would be achieved by reductions which Respondent deemed necessary, even though the Union never disputed the merits of that reduction level. The indexing proposal seemed more ploy than reality. That is, it avoided, rather than addressed, the reductions issue. In the end, it appeared to be a disguise for what would become wage increases.

In the area of overall approach to negotiations, in contrast to the Union, Respondent had representatives attend every scheduled negotiating session. Respondent never missed a meeting and never canceled a scheduled negotiating session. Indeed, it sought to meet even more frequently; only the Union's inability or unwillingness to do so prevented additional negotiating sessions from being conducted.

Respondent supplied to the Union an ongoing series of updated counterproposals, as well as written explanations, calculations, and other information. Although Adams sometimes became angry and short during negotiating sessions, it had been Kodluboy who had engaged in more "obstreperous conduct during the meetings"—from the very first meeting on June 9, as described in section I,M, supra, threatening a "corporate campaign" if there were disagreements during negotiations and, periodically throughout negotiations, accusing Respondent of improper and illegal conduct—which naturally tended "to deter consensus." *Radisson Plaza Minneapolis v. NLRB*, supra, 987 F.2d 1376 (8th Cir.). Moreover, Kodluboy's May and November explanations for not appearing for scheduled meetings, which were obviously untrue, hardly promoted the type of confidence in his word which is needed

fidence in his word which is needed for meaningful bargaining to flourish.

The foregoing three areas of analysis, each pertaining directly to bargaining which did occur, fail to establish that Respondent had been bargaining either with an intent to avoid reaching final agreement or with a "take-it-or-leave-it" attitude. In its conduct away from the bargaining table, Respondent did commit some unfair labor practices, as discussed below. Collectively, however, they fail to overcome the direct evidence in the above three areas which shows directly that Respondent did conduct its bargaining in a manner which did not violate Section 8(a)(5) of the Act. That is, standing alone, those unfair labor practices away from the bargaining table fail to establish that Respondent had actually bargained in violation of the Act and fail to establish that Respondent violated the Act by implementing its Last, Best, and Final Offer, which had been requested by the Union.

As described in section I,L, supra, Respondent did violate Section 8(a)(1) of the Act by supervisory threats of work relocation to Jerome if the Union did not begin meeting to conduct negotiations. However, such threats hardly display absence of intention to bargain for an agreement.

Respondent did violate Section 8(a)(5) and (1) of the Act by its delay in providing completed evaluation forms to the Union. Such information relates directly to Respondent's view of employee performance. Thus, it is relevant for a bargaining agent to discharge its representative obligation to employees. To be sure, Respondent was entitled to time to ascertain if providing that information might contravene some law. Still, there is no evidence showing that disclosure of completed evaluations is prohibited by public policy, that Respondent had led employees and supervisors to believe that completed evaluations would be confidential, that employees believed the completed evaluation forms would be kept confidential, or that any employee had requested that his/her completed evaluation be kept confidential. Accordingly, there was no basis for a conclusion that completed evaluations were confidential matters with regard to the Union. See, e.g., *Holiday Inn on the Bay*, 317 NLRB 479, 482–483 (1995).

Employers are obliged to exercise reasonable diligence in providing relevant information requested by their employees' bargaining agents. Even though Respondent was entitled to a reasonable period to verify with counsel whether the completed evaluations could be provided to the Union, 3 months is an unreasonably long period to allow for doing so. Such a delay is unwarranted. Unwarranted delay in providing relevant information is as violative of the Act as absolute refusal to do so. *Postal Service*, 308 NLRB 547 fn. 1 (1992). See also *Iron Workers Local 86*, 308 NLRB 173 fn. 1 (1992).

As to other allegations concerning that evaluation system, discussed in section I,N, supra, and the 1995 revision of monthly evaluation forms, discussed in section I,U, supra, on both occasions those changes were unilateral ones which violated Section 8(a)(5) and (1) of the Act. Completed evaluation forms are maintained in employees' personnel files and, obviously, can later be used in connection with personnel actions affecting those employees, as Adams acknowledged. No prior notice of changes was given to the Union before the system was implemented during June 1994 and before the monthly form was revised during mid-1995.

Respondent contends that the revision had an insubstantial affect on unit employees' terms and conditions of employment. Comparison of the two forms does appear to show that the revisions constitute mostly restatements, in different terms, of the same matters covered by the original monthly evaluation form. Yet, appearances can be deceptive.

If mere restatement was all that truly had been involved in August 1995, the Union was entitled to know as much before the revised form was introduced. Moreover, by mid-1995 Respondent appears to have fallen into somewhat of a bad habit, as discussed below, of taking actions without bothering to inform the Union that such actions were being taken. In such circumstances, a seemingly minor infraction takes on added significance. In light of these considerations, I conclude that by revising the monthly evaluation form, without prior notice to the Union and without affording it a meaningful opportunity to bargain about that change, Respondent violated Section 8(a)(5) and (1) of the Act.

As to implementation of the 1994 evaluation system, Respondent argues that its introduction had been contemplated as early as January or February of that year. Indeed, as described in section I,K, supra, the Employee Committee had been told, at the April 6 monthly meeting, that Respondent intended to implement "an employee evaluation program." However, they also were told that Respondent was "still working out the details to the program" and that supervisors will begin filling out forms only when the program was "complete."

Supervisors did not begin doing so until June 1994, well after the Union had prevailed in the representation election and had been certified as the representative of employees whom Respondent began evaluating that month. Respondent argues that this had been no more than a delay in implementation, occasioned by the need to train supervisors about how to administer the system. That seems somewhat of a hollow explanation, given the relative handful of supervisors employed at Albert Lea and the 2 months which elapsed before so relatively straightforward a system was implemented.

Even so, however, if the supervisors were not trained until June 1994, only then could the system have been implemented. There was no legitimate reason for Respondent not to notify the to-be-evaluated employees' bargaining agent that such a system, which did represent a change in practice at Albert Lea before then, was being implemented during June. Nor, so far as the record discloses, was there so pressing a need to quickly implement that system—already delayed for several months—that the Union could not have been afforded a meaningful opportunity to bargain about its implementation and content. Respondent's failure to satisfy that bargaining obligation violated Section 8(a)(5) and (1) of the Act.

As to the remedy for those changes, during the October 12 negotiating session, described in section I,P, supra, the parties agreed that Respondent would meet separately with the employee negotiators on the Union's bargaining team. The purpose for that was so that Respondent could explain the system and consider the employees' observations. There is no contention that such a meeting or meetings did not occur. Nor is there evidence that requests for changes in the evaluation system had been made by the employee-negotiators. More importantly, there is no allegation that Respondent had refused to bargain about any requests for changes or modifications of the evaluation system implemented during June 1994.

In consequence, while Respondent did violate the Act by implementing the 1994 evaluation system without sufficient notice to the Union, subsequent dealings between the parties

appear to have eliminated any need for an order that the system be rescinded. To the contrary, the Union's satisfaction with that system is the predicate for its objection to the 1995 revision of it. As to the latter, I shall order that, if requested by the Union, Respondent shall rescind the 1995 monthly evaluation form, restore the 1994 form, and remove from its personnel files all competed 1995 monthly forms.

Similarly, I shall order that Respondent attempt to restore Phoenix American Life Insurance Company as insurance carrier under its Health & Insurance Plan Appendage, if requested by the Union to do so. As set forth in section I,U, supra, Respondent changed carrier in direct contravention of the terms of its own Last, Best, and Final Offer which it implemented. It should not have done that when it did and it gave no prior notice to the Union of its intent to do so.

Respondent contends that the change caused no change to benefits. But, that may not always be the fact. Carriers have changed coverage over time. In any event, their handling of claims and related matter is a valid concern for employees and, concomitantly, for their bargaining agent. After all, Respondent must have had some reason for switching carrier. By making this unilateral change, Respondent violated Section 8(a)(5) and (1) of the Act.

It also did so when it changed the practice of filling vacancies strictly by seniority, as described in section I,S, supra. There appears to have been a good reason for the change which precluded work-restricted employees from selection, at least in certain situations. If truly so, however, those reasons should have been addressed in the collective-bargaining context, before making the change. Subsequent bargaining about this type of already changed and implemented practice does not erase the harm caused by such unilateral action. Therefore, by changing the practice for selecting employees to fill vacancies, Respondent violated Section 8(a)(5) and (1) of the Act.

Either Charles Joel or Gregory McKane should have been selected, under the practice prior to 1995, for the one posted vacancy which was litigated. To remedy that unfair labor practice, Respondent shall be ordered to make the more senior of the two men whole for any loss of pay or benefits he may have suffered from being passed over. Moreover, that same remedy shall be provided for any other employee who similarly was passed over as a result of application of that same unilateral change in practice. However, restoration of the pre-1995 practice shall not be ordered, since the situation now is encompassed by the terms of the Last, Best, and Final Offer implemented June 5, 1995.

Two other allegations involve direct dealing or the potential for it. The General Counsel alleges that the survey distributed at the behest of Rebecca Anderson constituted an effort by Respondent to bargain with its represented employees about work schedules, and their shifts and work hours. I do not agree.

No doubt the survey asks the type of questions which pertain to hours of work, within the meaning of Section 8(d) of the Act. Were an employer to submit those questions to represented employees, its conduct would constitute bypassing their representative and bargaining directly with those employees.

In the instant case, however, the survey had been prepared for distribution at a meeting of the safety committee, a joint union-management entity described in section I,U, supra. Further, it had been prepared as a result of discussions at a State-sponsored safety conference, not by officials of Respondent. There is no evidence that Respondent, or any of its officials, had sponsored or intended the survey to be a vehicle for changing work schedules. True, Miland had chaired the safety meeting after which the surveys had been distributed to employee-members by Rebecca Anderson. But, the surveys had been distributed at the end of that meeting, as employees had been leaving. There is no evidence that Miland, or any other official of Respondent, had been aware of what Rebecca Anderson was doing.

In an apparent effort to attribute to Respondent the circulation of the survey, Nellis testified that his shift supervisor had directed him to complete one of the surveys. Given the circumstances described in section I,U, supra, I regard that testimony to be unreliable—as no more than another effort to attribute unfair labor practices to Respondent.

There is no evidence that, during the summer of 1995, Respondent had been disposed to modify its work schedule, shifts, or hours. Moreover, there is no evidence that by distributing the survey, Rebecca Anderson had intended to disrupt or divert the bargaining relationship between the Union and Respondent. In fact, there is no evidence that she even had been aware of the potential for doing so, as a result of circulating her survey. Rather, she appears to have been doing no more than pursuing a safety-related subject which had been raised during a state safety conference. In all the circumstances, I conclude that her circulation of the survey did not constitute an effort by Respondent to bypass the Union and bargain directly with unit employees about their work schedule, shifts, and hours. Therefore, I shall recommend that this allegation be dismissed.

A contrary conclusion is warranted with regard to the allegation that Respondent unilaterally changed practice for determining startup time following holiday shutdowns. Though VanKampen waffled about that practice, he eventually did concede that pre-1995 practice had been to "poll" employees as to their preferences for starting up at 9 or as early as 6 a.m. following a holiday shutdown. He also admitted that this practice had not been followed after 1995's Memorial Day and Independence Day shutdowns. Respondent admits that the Union was not given prior notice of the change.

The direct bargaining implications of that change were raised by VanKampen. He testified about concerns with accusations by bypassing and direct dealing, had Respondent perpetuated the practice during mid-1995. Of course, that is a valid concern, since Respondent was obliged to deal with the Union, not with its employees. Still, it was a concern which could have been avoided by giving notice to the Union of intent to continue the practice or of intent to discontinue it, with opportunity to bargain about the change in the event of notice of the latter course. Admittedly, Respondent did not pursue that course.

I conclude that by changing the practice of polling employees as to startup time after holiday shutdowns, without prior notice to the Union, Respondent violated Section 8(a)(5) and (1) of the Act. In the past, employees had never voted for a startup time earlier than 9 a.m. Yet, by Memorial Day 1995, Albert Lea employees were facing wage reductions, as a result of Respondent's Last, Best, and Final Offer. The General Counsel correctly points out that in the face of those reductions, the employees might well have voted to return to work at 6 a.m., or at least at an hour earlier than 9 a.m. There is no evidence that Respondent would have objected to their doing so. Inasmuch as the uncertainty as to what would have happened has been created by Respondent's unilateral discontinuance of practice, as a wrongdoer it should be Respondent who bears the

burden of that uncertainty. I shall recommend that employees be made whole for this unfair labor practice, and that the make whole remedy shall apply to any startup after any holiday since Memorial Day 1995 where Respondent has not followed that practice.

In section I,K supra, I concluded that Respondent did not engage in unlawful unilateral conduct in connection with the "peak alert" shutdowns during 1994. In section I,O, supra, I concluded that neither did it do so in connection with retention of express personnel during and after September 1994. I further conclude that it did not violate Section 8(a)(5) and (1) of the Act by increasing Jerome production to 50 percent of that facility's capacity during July 1994.

The decision to increase the level of Jerome production is not one encompassed by the Act. Rather, it was an entrepreneurial decision, having no relation to labor relations at Albert Lea. Respondent did not transfer work to Jerome from Albert Lea; it only increased production there. There was no further increase of Jerome production after July 1994. As described in section I,N, supra, the July production increase at Jerome had been decided upon well before the Union became the bargaining agent of Albert Lea employees. Most importantly, that decision had been based upon problems arising from underutilization of the Jerome facility, not upon costs of production at Albert Lea. The latter had no influence upon the increase in Jerome production in July 1994.

Beyond that, during July 1994, the Union had been unwilling to discuss "economics." To the extent that production increase at Jerome might have been bargainable to some extent, Adams continually offered the Union an opportunity to do so. The Union continually rebuffed those offers. Consequently, even had the increase in Jerome production, or its effects on Albert Lea employees, been a bargainable subject under the Act, the Union rejected opportunities to discuss and negotiate about it. Therefore, I shall dismiss the allegation that Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain about the July 1994 production increase at Jerome.

In addition, I shall dismiss the allegations that Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify the Union of the May 23 group layoff, of the fact that employees laid off during April and May 1993 would not be recalled until orders could not be filled from existing inventory, and of the fact that managerial personnel would be performing unit work of laid-off employees. To be sure, Respondent did not give prior notice to the Union before the May 23 group layoff had been announced on May 9. Nor did it give the Union notice of the anticipated length of that layoff, nor of prior group layoffs, and of the circumstances under which laid-off employees would be recalled. And, it did not specifically give prior notice to the Union that managerial personnel would be performing whatever work the employees laid off on May 23 would otherwise have performed.

Still, the May 9 notice of the May 23 layoffs afforded 2 weeks for bargaining to be requested about that final group layoff. Of course, as described in section I,L, supra, the Union was not meeting with Respondent during that month. Moreover, the fourth group layoff had been but another incremental step in Respondent's pre-existing plan to reduce inventory by laying off primarily production employees to reduce the level of production. Like the decision to increase Jerome production to 50 percent of that facility's capacity, the decision to reduce inventory had been an entrepreneurial one, unrelated to subjects entrusted to the bargaining process under Section 8(d) of the Act.

As a result, even had the Union requested bargaining about the fourth group layoff, it could only have bargained about the effects of it on the employees being laid off at that time. It never disputed that it had known that the layoff would be occurring after May 9. It never did make a request to bargain about its effects on unit employees. See *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975).

As to recalls, once it eventually began meeting with Respondent, the Union periodically complained that unit employees were on layoff status. Yet, a mere protest is not tantamount to a request for bargaining. See *Associated Milk Producers*, 300 NLRB 561, 563–564 (1990), and *Clarkwood Corp*., 233 NLRB 1172 (1977). Here, the Union formulated no specific recall demands which it sought to negotiate with Respondent. Consequently, it cannot be said that Respondent violated the Act by not bargaining about failures to recall, in general, which the Union clearly was aware had not been occurring. In any event, as discussed above, failure to earlier recall employees laid off during April and May had been the result of the entrepreneurial decision underlying the layoffs, themselves. Accordingly, as with the layoffs, the subject of earlier permanent recall of those employees was not a matter for collective bargaining.

The same conclusion exists as to supervisors and managers performing unit work during the layoff period. That had been a preplanned course of action, arrived at in conjunction with Respondent's overall plan to reduce inventory by reducing production. Although the amount of such work increased after the May 23 group layoff, it already had been increasing steadily as each previous group layoff had occurred. Moreover, supervisors always had performed some unit work at Albert Lea, and almost all production work at Jerome. Finally, while Respondent remained firm about the need for supervisors to perform production work, when the Union sought to bargain about the subject, there is no evidence that Respondent had been unwilling to listen to the Union's arguments and negotiate about the subject of supervisory performance of unit work. Therefore, I shall dismiss the foregoing allegations that Respondent violated Section 8(a)(5) and (1) of the Act by laying off employees on May 23, refusing to recall laid-off employees, and assigning supervisors to perform the work of laid-off employees, without prior notice to the Union of those actions or inactions.

A contrary conclusion is warranted regarding two aspects of the group layoffs and recalls from layoff. First, during the overall April to October layoff period, Respondent recalled some employees and, then, again laid off some of those who were recalled. In doing so, it excluded from recall work-restricted employees and, in the overall recall order, it also excluded work-restricted employees from recall until the very end of all recalls. Obviously, that procedure is contrary to the practice called for by section 4.3 of the agreement with the Employee Committee, quoted in section I,D supra. Although Respondent had never laid off employees prior to April 1994, and never had the opportunity before then to recall them, the Agreement's provision embodied the practice pertaining to recalls, should they occur.

There is no evidence of a firm decision to change that procedure made prior to the representation election. It was not a part of the preexisting plan of actions to reduce inventory. Moreover, it is undisputed that Respondent never notified the Union

before beginning to skip over work-restricted employees for recall.

That recalls had been made and that some recalled employees were again laid off, does not constitute a true change in the circumstances of this case. As discussed in section I,M, the basic status of those laid-off employees, from spring through summer and into early fall of 1994, had been that of laid-off employees. That some were able to return to work temporarily had been the result of Respondent's unforeseen need to produce certain products for which unanticipated orders, not fillable from inventory, had been received. Indeed, even temporary recall seemed to correspond with the Union's professed desire to get laid-off employees back to work.

As a result, had Respondent merely recalled employees to perform work and, then, again returned them to layoff status after unanticipated orders had been filled, there would be no violation of Section 8(a)(5) of the Act. The layoffs had resulted from preexisting decisions, before the Union became the bargaining agent of Albert Lea employees. Recalls were contemplated under the practice explicated in the employee committee's Agreement with Respondent. The Union made no demands to bargain about the temporary recalls and never submitted any proposals concerning them.

What the Union did protest and try to bargain about was Respondent's post-April 29 decision to exclude work-restricted employees from seniority order of recall, as described in section, I,N, and O. Since the change had been based on decisions separate from ones concerning production reduction to reduce excess inventory, and inasmuch as there is no reliable showing that it had preceded the Union's selection as the bargaining agent of Albert Lea employees—and was never implemented until after then—Respondent's failure to give notice to the Union of that change in recall order, and to afford the Union a meaningful opportunity to bargain about it, violated Section 8(a)(5) and (1) of the Act.

Although Kodluboy appears to have eventually accepted Respondent's explanation for the change in recall order, there is no basis for concluding that, had Respondent given prior notice of it, the Union might not have been able to negotiate an alternative procedure which would have benefited at least some work-restricted employees. As the wrongdoer, Respondent must bear the burden of that uncertainty. Therefore, I shall order that Respondent make whole all work-restricted employees not recalled, including for temporary recalls made during June and July 1994, in seniority order in conformity with the practice set forth in section 4.3 of the employee committee's agreement.

The second change not encompassed by decisions to reduce inventory by reducing production at Albert Lea was the decision to make a schedule change which began on May 23, 1994. As described in section I,L, that decision was made after the Union had become the employees' bargaining agent. At least, there is no evidence that the decision to change the work schedule had been made before then. To be sure, it had been made during a period when Kodluboy had not been meeting with Respondent to commence negotiations. Still, the May 1994 schedule change was the first of what became an ongoing series of periodic unilateral changes by Respondent.

Respondent would have been subjected to no burden by giving prior notice to the Union of the proposed schedule change. Had the Union not responded to it, then Respondent could have proceeded to change the work schedule. By not following that course, it engaged in unilateral conduct which violated Section 8(a)(5) and (1) of the Act. Inasmuch as that change caused employees who were working to lose overtime pay they otherwise would have earned, I shall order that Respondent make whole those employees for any loss of pay they suffered as a result of the May 23, 1994 schedule change.

The foregoing unlawful unilateral changes are relatively high in number and occurred over a relatively prolonged period. Nevertheless, even collectively they do not suffice to establish overall bad-faith bargaining by Respondent. In the context of the above-discussed evidence about conduct at the bargaining table, the unlawful unilateral changes do not detract from the lack of direct evidence that Respondent had not been attempting to avoid reaching agreement with the Union and, moreover, had not been bargaining with a mind closed to compromise, in a "take-in-or-leave-it" attitude.

Furthermore, inherently those unilateral changes did not naturally impair ability to reach legitimate impasse during negotiations. None of the changes affected, actually or inherently, the ability of the parties to bargain meaningfully. More significantly, none of them contributed to the impasse which was reached in May 1995, when the Union asked for a last and final offer and, following its rejection, when Respondent implemented the terms of its Last, Best and Final Offer during June 1995. All that the unilateral changes show is a failure by Respondent to observe all aspects of its statutory bargaining obligation, not that it disregarded, or was disposed to disregard, the entirety of the bargaining obligation imposed on it under the Act.

CONCLUSIONS OF LAW

Bridon Cordage, Inc. has committed unfair labor practices affecting commerce by failing to promptly provide completed monthly evaluations requested by United Steelworkers of America, AFL–CIO, CLC—as the exclusive bargaining representative of all employees in an appropriate bargaining unit of: All hourly, full-time and regular part-time production and maintenance employees employed at Bridon Cordage, Inc.'s Albert Lea, Minnesota facility; excluding office clerical employees, confidential employees, professional employees, managerial employees, guards, and supervisors as defined in the Act—and by unilaterally changing shifts of days and hours of work for 1 month, failing to recall employees from layoff in seniority order, implementing an evaluation system and revising that system, changing practice for selecting applicants for posted vacancies, changing the practice of polling employees as to desired startup time following holiday shutdowns, and changing the group insurance plan carrier, in violation of Section 8(a)(5) and (1) of the Act, and by threatening employees that unit work would be relocated to Jerome, Idaho, if United Steelworkers of America, AFL–CIO, CLC did not begin meeting to conduct negotiations, in violation of Section 8(a)(1) of the Act. However, Bridon Cordage, Inc. has not violated the Act in any other manner alleged in the consolidated and amended complaint, and amendment thereto, in Cases 18–CA–13178 and 18–CA–13344, nor in the complaint and second amendment to complaint in Case 18–CA–13632.

REMEDY

Having concluded that Bridon Cordage, Inc. engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the

Act. With respect to the latter, it shall be ordered, if requested to do so by United Steelworkers of America, AFL–CIO, CLC, to rescind the mid-1995 revision of monthly evaluation forms and, further, to remove from the files of all hourly, full-time and regular part-time production and maintenance employees employed at Bridon Cordage, Inc.'s Albert Lea, Minnesota facility all copies of completed revised forms and not to rely upon any of them in any future personnel actions concerning those employees. In addition, upon request of the above-named labor organization, it shall make a meaningful effort to restore coverage under its group insurance plan by Phoenix American Life Insurance Company for the employees described above.

Furthermore, because of its unlawful unilateral conduct, it shall be ordered to make whole all those employees, in accordance with standard Board backpay principles, who suffered losses as a result of its implementation of a work schedule change on May 23, 1994, its failure to observe the practice of polling employees about startup times after holiday shutdowns on Memorial Day, Independence Day, and other holidays occurring after May 29, 1994; all work-restricted employees who were skipped over in the course of recalling employees from layoff between June and October 1994; and, the more senior of Charles Joel or Gregory McKane passed over for a job opening during 1995, as well as any other work-restricted employees who later were passed over for vacancies because of the unilateral change in selecting employees for posted vacancies. Interest shall be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]